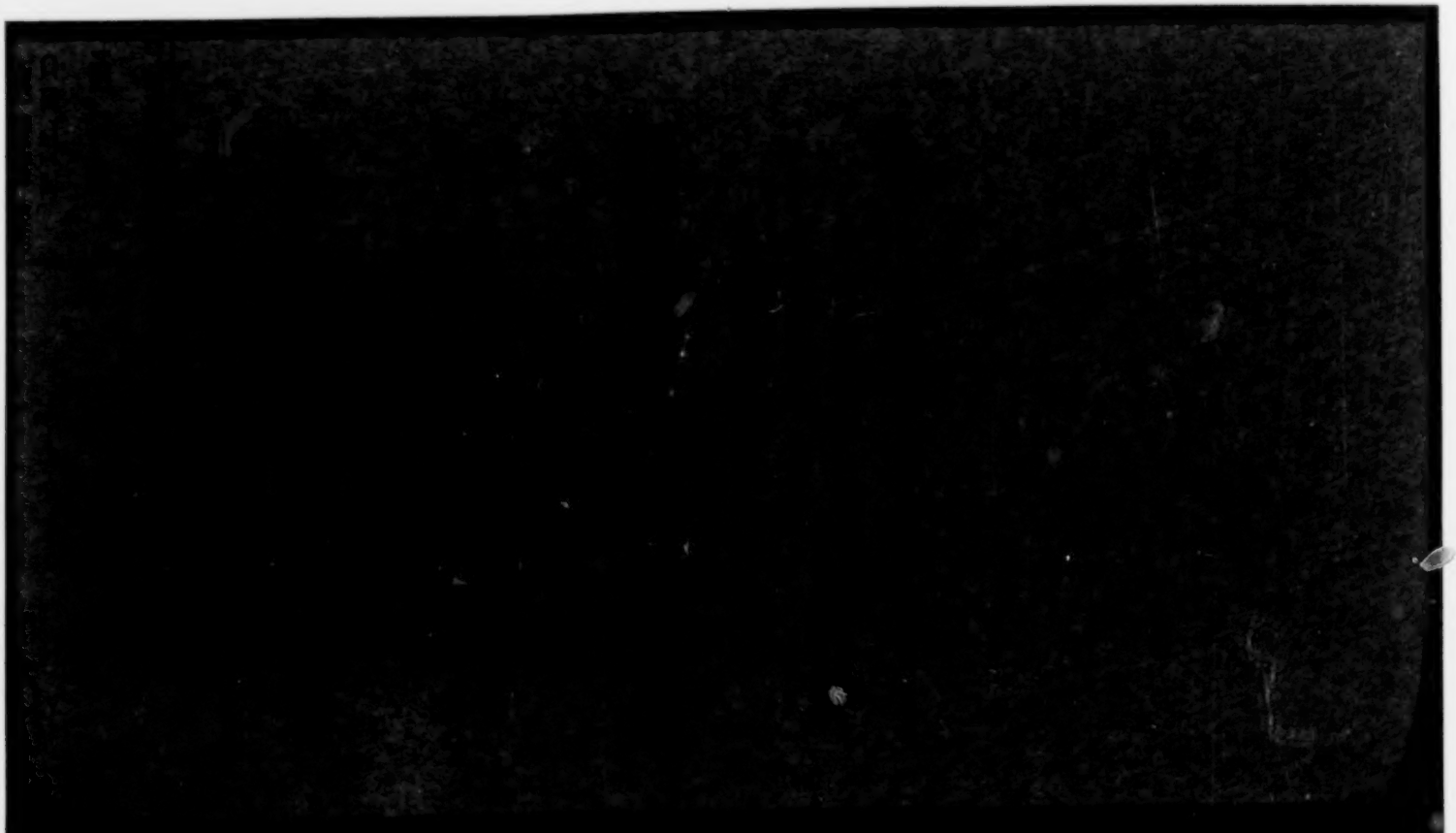


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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. —.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOYCE AGENCY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above case on March 29, 1954, petition for rehearing denied on April 23, 1954.

OPINIONS BELOW

The memorandum opinion and the "Findings of Fact and Conclusions of Law" of the District Court appear in the record at pages 92 to 118. The opinion is reported at 110 F. Supp. 918. The opinion of the Court of Appeals (App. 1a–15a) is reported at 211 F. 2d 241.

JURISDICTION

The judgment of the Court of Appeals (App. 15a) was entered on March 29, 1954, and peti-

tioner's petition for rehearing was denied on April 23, 1954 (App. 16a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether guards and watchmen, and related clerical workers, employed to furnish theft and fire protection to the warehouses of an interstate chain-store organization, where large amounts of merchandise from out-of-State sources are regularly received, unloaded, packaged and otherwise handled, and shipped out of the State, are engaged "in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of October 26, 1949, c. 736, 63 Stat. 910; 29 U. S. C. 201 *et seq.*, are:

Definitions:

> Section 3 (63 Stat. 911): As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other

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manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * *

Maximum Hours:

Section 7 (63 Stat. 912):

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

STATEMENT

This action was brought by the Secretary of Labor pursuant to Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime provisions of the Act. The facts of the case were largely stipulated (Stipulation of Facts, R. 14–58), and the Findings of Fact by the district court (R. 101–117) are undisputed. Respondent, Joyce Agency, Inc., is an

Illinois corporation with its central office and place of business in Chicago, engaged in the business of furnishing watchman, guard, detective, and fire inspection services to the huge multi-million dollar interstate merchandise system of Goldblatt Brothers, Inc. (Fdg. 1; R. 101; opinion of dist. ct., R. 93).

Goldblatt Brothers, Inc. ("Goldblatt") owns and operates a chain of fourteen retail department stores, eleven of which are located in Illinois and three in Indiana, and four large warehouses in Illinois from which merchandise is distributed to the stores both in Illinois and Indiana (Fdgs. 2, 4, 5, 15, 27, 32; R. 101–102, 106, 110, 111). The total annual sales volume of Goldblatt's stores exceed $90,000,000 (Fdg. 2; R. 101). Most of this merchandise is distributed from the four warehouses directly to the stores by means of Goldblatt's own motor transportation system consisting of 127 trucks, 70 trailers and 17 tractors (Fdg. 3; R. 101, 93).

Each of the four warehouses regularly and daily receives in interstate commerce from points outside of the State of Illinois large quantities of merchandise, having an annual sales value of millions of dollars. A "very large percentage of these goods are distributed from the four warehouses directly to stores in Indiana" (R. 93). At the "Wentworth Warehouse," for example, more than 30 million dollars worth of merchandise is received and shipped per year, 70 percent

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of which is regularly received from out-of-State sources, and 20 percent of which is shipped to the Indiana stores (Fdg. 5; R. 102). At the "Ashland Warehouse and Garage," 12½ million dollars worth of merchandise is received and handled, 65 percent of which is regularly received from out-of-State sources, and 20 percent of which is shipped to the Indiana stores (Fdg. 15; R. 106). At the "63rd Street Warehouse", over 10 million dollars worth of merchandise is received and handled, 50 percent of which is received from out-of-State sources, and 17 percent of which is shipped to Indiana stores (Fdg. 27; R. 110). At the "Wabash Warehouse", more than 18 million dollars worth of merchandise is received and handled, 22 percent of which comes from out-of-State sources, and approximately 2 percent of which is shipped to Goldblatt customers outside of Illinois (Fdg. 32; R. 111).

Goldblatt employs approximately 400 employees at these four warehouses to receive, unload, check, handle, assemble, repack, and reship the merchandise (Fdgs. 7, 17, 29, 33; R. 102, 106, 110, 112). Typical of the operations involved at the Goldblatt warehouses are those performed at "Wentworth," which are summarized in the district court's Findings of Fact as follows: "The receiving department employees deposit these goods on the receiving platform and on freight elevators adjacent to and opening onto the railroad siding. Shipments from 50 to 60 trucks and

trailers are received daily and an average of four railroad freight cars is received each week. 'Break-bulk' shipments, which are received daily, are taken after unloading directly from the receiving platform to the shipping platform for immediate forwarding to a particular Goldblatt store designated on the common carrier freight bill for such shipment. All other goods, after being unloaded, are moved to the various stock departments and are unpacked, counted, checked, marked, and placed in stock. Orders for all Goldblatt stores are filled from said stock departments in the following manner: The merchandise is picked from stock, placed in bins, checked and packed in containers, or placed on racks; sorted and checked by store, taken to the 'store runs' on the shipping platform, from which they are loaded onto Goldblatt's trucks and trailers, and transported to Goldblatt's stores, including the three Indiana stores. Orders not completely picked or packed by quitting time are left in that incompleted state in their respective stock departments until the next working day. Assembled goods are left in the 'store runs' until the next working day. Trucks or trailers which are loaded and sealed, partially loaded, or empty also remain in the warehouse until the next working day. An average of 75 Goldblatt trailers is loaded weekly at the shipping platform and of this number approximately 15 trailers a week go to Goldblatt's Indiana department stores. Goods

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are daily transported to Goldblatt's stores, including the stores in Hammond, Gary, and South Bend, Indiana" (Fdg. 8; R. 102–103).

Respondent Joyce Agency furnishes the watchmen and guards to protect the merchandise and the warehouses during all of these operations. While the individual duties of the guards, watchmen and detectives vary somewhat at the different warehouses, the protection service rendered "is basically the same in all four warehouses" (dist. ct. opinion, R. 94). "The primary difference is found in the number of employees used by defendant at the various warehouses to administer this protective service," which "seems to be determined by the volume of business activity at each establishment" (*ibid.*). As the district court found, respondent Joyce Agency "offers Goldblatt Brothers a highly systematic protection service, which exceeds the normal watchman activity" and includes maintaining "a close watch over all stages of the respective operations on both the receiving and shipping platforms," as well as "patrol [of] the entire premises, guard[ing] the goods in all stages of being received, handled, stored, prepared for shipments and shipped including those enroute to the shipping platform and on the receiving and shipping platforms, as well as in the railroad cars and motor trucks and trailers in the truck pit, together with the cars, trucks and trailers themselves from fire, theft and other damage" (R. 94).

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The close integration of the duties of respondent's employees in the warehouse operations of Goldblatt is well illustrated by the district court's finding as to the procedure for handling valuable goods at the Wentworth warehouse (Fdg. 11; R. 103–104). The shipping platform guard takes "personal custody" of these "'valuable goods' (goods particularly susceptible to theft, such as cigarettes, furs, jewelry, guns, and nylon hosiery) * * * at a designated place on the shipping platform, guarding them at all times while they are on the platform and throughout the loading process until the trailer is locked and sealed, and then preparing a shipment memorandum listing the nature of the goods being shipped, department number, number of pieces, bill number, trailer number, and seal number. He gives this memorandum to the [respondent's] Wentworth Warehouse front door guard, who transmits this information to [respondent's] guard or special service man stationed at the Goldblatt store to which the goods are being shipped" (Fdg. 11; R. 103–104).

Respondent coordinates the service it renders to Goldblatt through a central office in Chicago which performs "the administrative work integrating [respondent's] furnishing of night watchman, guard, detective, fire inspection, and shopping service to Goldblatt" (Fdg. 36; R. 113). Inasmuch as respondent testified that it had only one other client to whom it furnished two or three

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persons out of a payroll of 85 people (R. 70–71), practically the entire work of the bookkeepers, statement clerk, and switchboard operator concerned herein was in connection with the service rendered to Goldblatt.

The duties of the switchboard operator have been performed by the bookkeeper four days and by the statement clerk one day each week (Fdgs. 37, 38, 39; R. 113–115). As switchboard operator, the bookkeeper and statement clerk "handle all incoming and outgoing calls through the switchboard in [respondent's] central office, including all calls between [respondent's] central office and [respondent's] employees stationed in all Goldblatt warehouses and stores" (Fdg. 39; R. 114). Calls to and from Goldblatt's Indiana stores are placed daily through the switchboard at Goldblatt's State Street store in Chicago which has a direct line to each of them (Fdg. 39; R. 114, 64–65). "Employees in respondent's central office also make calls to and receive calls from points in States other than Illinois and Indiana, depending on the circumstances of the business" (Fdg. 39; R. 115).

The district court held that the Act covered all of respondent's guards and watchmen employed at Goldblatt's warehouses, and the clerical workers performing the administrative work in connection with furnishing such guards, including the switchboard operator (R. 117). The activities of respondent's guards and watchmen in the various warehouses, concluded the district court, "con-

tribute so materially and directly to interstate commerce as to be a part thereof * * *. They are the integral components of a highly [illegible]-matic security system which is as important and vital part of this commerce as traffic control and other warehousing and shipping techniques. This is borne out by the fact that the protection service is given not only at the warehouse premises but also during the course of transportation itself, by means of telephonic communications regarding shipments to designated stores. The fact that the night watchmen assume none of these operational duties, but are limited, more or less, to the patrolling and guarding of the premises during the night hours does not withdraw them from interstate commerce. They guard against fire, theft, and other hazards, during a time of greater need, not only the wares, which are in the process of being received as well as shipped in interstate commerce, but also the vehicles, which are the instrumentalities of that commerce" (R. 95–96). The trial court concluded that the guards at the warehouse were also engaged "in the production of goods for commerce because they are engaged in a 'closely related process or occupation directly essential to the production' of goods for commerce which is being carried on at the various warehouses" (R. 96). Respondent's employees at its central office were also held by the trial court to be engaged in both interstate commerce and production of goods for commerce,

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both by reason of their direct "interstate telephone activity" and "interstate use of the mails" as well as by reason of the fact that their activities "effectuate the coordination, integration and orderly administration of the defendant's protection service at the warehouses, where there is production of goods for commerce" (R. 97–98).

The court of appeals reversed on the ground that neither guards and watchmen employed at Goldblatt's warehouses where goods are regularly received, handled and shipped in interstate commerce, nor the office and clerical employees performing the necessary administrative work in connection with furnishing such guard service, are engaged "in commerce" within the meaning of the Act (App. 12a, 14a–15a); that coverage cannot be sustained for these employees on "production" grounds since Goldblatt's handling of goods in this case does not constitute "production" (App. 8a); and that the making of interstate telephone calls between employees of the same employer is not "communication" in interstate commerce (App. 12a). Out of a total of approximately 85 employees, the only employees held covered by the Court of Appeals were two guards at Goldblatt's bakery (who were conceded to be engaged in production of goods for commerce), and three "seal-checking guards," who check the lock and seals on trucks before permitting them to unload or to leave the warehouses when loaded. The office and clerical employees were disposed of on the ground that

the record did not establish that they "are devoting a substantial part of their time to these five employees" (App. 14a). The other guards, the court stated, "do not physically handle the goods received or shipped" (App. 3a).

REASONS FOR GRANTING THE WRIT

The decision below, both in its result and its reasoning, conflicts directly with decisions of several other Courts of Appeals, as well as with previous decisions of its own. It is also patently inconsistent with the numerous decisions of this Court construing the scope of the coverage of this Act. If unreviewed, the decision below can serve only to confuse and unsettle important areas of the Act's coverage.

1. The ruling that the guards and watchmen are not engaged "in commerce" is in direct conflict with the Fifth Circuit's decisions in *Walling* v. *Sondock*, 132 F. 2d 77 (C. A. 5), certiorari denied, 318 U. S. 772; and *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5); and is also in conflict with the Fourth Circuit's decisions in *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4); *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (C. A. 4).

The *Sondock* and *Russell* cases are indistinguishable from the instant case; indeed, the factual situation in the instant case affords an even stronger basis for coverage. In *Sondock*, as here, a watchman agency was involved. It rendered services generally to interstate whole-

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salers and distributors as well as to producers of goods for commerce. The Fifth Circuit held that the watchmen who guarded and protected the interstate distribution transactions were engaged "in commerce." The same result was reached in the *Russell* case with respect to a watchman who guarded the entire premises of a wholesale grocer, including the yard where motor trucks were parked and the spur tracks on which there were freight cars to be unloaded. There the Fifth Circuit pointed out that it had held in the *Sondock* case that *"night watchmen who guarded and protected interstate distribution transactions were 'engaged in commerce'"* (187 F. 2d at 526; emphasis added).

The *Sondock* decision states the test for determining coverage in this type of case as follows: "* * * if an employee's services are part of and contribute materially to the consummation of transactions in interstate commerce, the employee is engaged in commerce as defined by the Act" (132 F. 2d at 78). The services performed by the employees in this case meet that test *a fortiori,* since they are performed exclusively for and are directly integrated into Goldblatt's extensive interstate transactions. In findings of fact, unchallenged by the employer, the trial court found that the employees render "a highly systematic protection service, which exceeds the normal watchman activity," to Goldblatt's huge interstate

merchandise business, that the "guards maintain a close watch over all stages of the respective operations on both the receiving and shipping platforms," that the "night watchmen patrol the entire premises" and "guard the goods in all stages of being received, handled, stored, prepared for shipments" (R. 94). In short, their services are "integral components of a highly systematic security system which is as important and vital part of this commerce as traffic control and other warehousing and shipping techniques" (R. 95).

To the extent that the decision makes "physical" contact with goods or vehicles moving in interstate commerce the test for determining "in commerce" coverage of watchmen, it is also in conflict with the Fourth Circuit's decisions in *Slover* v. *Wathen* and *Bennett* v. *V. P. Loftis, supra.* In the *Slover* case, the Fourth Circuit held that the work of a watchman in guarding interstate barges while under repair was "so closely related to the movement of commerce as to be a part of it within the test prescribed by the Supreme Court in *McLeod* v. *Threlkeld,* 319 U. S. 491." And in the *Bennett* case, it applied the "in commerce" coverage to a watchman guarding the construction of a new highway bridge.

The decision in the instant case is also in conflict with the Seventh Circuit's own prior decision in *Engebretsen* v. *E. J. Albrecht Co.,* 150 F. 2d 602 (C. A. 7). That decision held that a watchman at the equipment and storage yard of an inter-

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state construction company was engaged "in commerce." Immediately after citing and discussing *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4) and other "in commerce" cases, the opinion stated (150 F. 2d, at 606):

> *Under repeated decisions* plaintiff's employment as watchman and caretaker was of such character and so intimately connected with the tools and equipment which passed into interstate commerce that it can be properly held that his services were so *essential to such commerce as to become a part thereof* * * *. [Emphasis added.]

The importance of this holding on "in commerce" coverage was emphasized on remand when the defendant sought to prove that "production" coverage was not applicable. The district court considered this offer of proof immaterial because "the defendant's liability can be predicated on *the sole ground of its having been engaged in interstate commerce.* The Circuit Court of Appeals, on facts admitted by the defendant * * * held that the District Court was in error in holding that the defendant was not engaged in interstate commerce." *Engebretsen* v. *E. J. Albrecht Co.*, 5 W. H. Cases 900, 10 Labor Cases ¶ 63,001 (N. D. Ill.—1946). [Emphasis added.]

Insofar as an engagement "in commerce" is concerned, the Seventh Circuit's opinion in the instant case does not consider or attempt to dis-

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tinguish either its own decision in *Engebretsen* v. *E. J. Albrecht Co.*, 150 F. 2d 602 (C. A. 7), or the decisions of the other court of appeals cited above which involved factual situations closely paralleling the facts of the instant case, but relies instead on *Carrigan* v. *Provident Trust Co.*, 153 F. 2d 74 (C. A. 3), which involved an entirely different factual situation; i. e., a night watchman at the branch office of a bank. In the *Carrigan* case, there were no findings by the trial court that the duties of these maintenance employees had any connection with the interstate aspects of the banking business, and the court of appeals, in affirming the trial court's ruling of no coverage, emphasized that "No act within the scope" of the night watchman's "duty touches any facet of the acts of commerce in which the bank was engaged" (153 F. 2d at 76). In contrast, here the district court found that the respondent's employees are "integral components of a highly systematic security system which is as important and vital part of this commerce as traffic control and other warehousing and shipping techniques" (R. 95), and specified in detail how the guards "maintain a close watch over all stages of the respective operations on both the receiving and shipping platforms."

2. The ruling that the respondent's employees are not within the "production of goods for commerce" phase of the Act's coverage is based on the conclusion that Goldblatt's warehouse employ-

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ees are not so engaged (App. 8a). Here again its holding is in conflict with the decisions of the Eighth Circuit Court of Appeals in *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C. A. 8); *Walling* v. *Friend*, 156 F. 2d 429 (C. A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C. A. 8); and cannot be reconciled with prior decisions by the Seventh Circuit holding acts of handling in the distribution of goods to constitute "production" (*McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329, certiorari denied, 332 U. S. 855; *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369, vacated as moot, 326 U. S. 690).

The *Wyandotte*, *Mutual Wholesale*, *Blue Star* and *Montgomery Ward* cases, like the instant case, all involved chain store organizations engaged in distributing goods manufactured by others. In all of these cases, the goods were handled, as here, in the course of receiving and shipping them into and out of the warehouses which served the selling outlets. Thus, the warehouse employees in *Wyandotte* were engaged in moving the goods into the warehouse, uncrating them, setting them up, repairing them, putting them in their proper space, taking them out to the platform and other similar handling. All of this work was held to have an "economic significance in relation to [the goods] being made a part of the stock of the Kansas store and plainly constituted the production of goods for commerce

within the definition of section 3 (j) of the Act" (169 F. 2d at 769). Similarly, in *Mutual Wholesale* where merchandise was repackaged, it was held that such work was "within that portion of the definition of 'produced' * * * which is expressed as 'handled, or in any other manner worked on in any State'" (141 F. 2d at 340).

The *Friend* case, though dealing with livestock and not involving a chain store organization, is also directly in point since the employer was not engaged in raising livestock but in selling it, which required such handling activities as sorting and grading. There the Eighth Circuit said: "Thus it appears that Congress intended the term 'production of goods for commerce' to be comprehensive and to include every incidental operation preparatory to putting goods into the stream of commerce," citing *Western Union* v. *Lenroot*, 323 U. S. 490.

As noted above, the decision in the instant case on the "production" question not only plainly conflicts with decisions of the Eighth Circuit but it is also in conflict with the Seventh Circuit's own prior decisions in the *Blue Star* and *Montgomery Ward* cases, *supra*. In *Blue Star*, the warehouses served a chain of retail stores located in Illinois and Indiana and performed functions similar in all relevant respects to the functions performed by the Goldblatt warehouses in this case. In sustaining coverage on "production" grounds, the Seventh Circuit relied on a decision by it involv-

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ing these same Goldblatt warehouses, and said (164 F. 2d at 330–331):

> * * * employees engaged in unloading and checking goods shipped in interstate commerce, and in handling them on the platforms, as well as those engaged in shipping such goods from warehouses in Illinois to stores in another state, *are all engaged in the production of goods for commerce or in an occupation necessary to such production*, *Walling* v. *Goldblatt Bros.*, 7 Cir., 152 F. 2d 475, 476 [emphasis added].

Though in the instant case "Goldblatt's [warehouse] employees receive, store, in some cases split up large packages of goods into smaller ones, and re-ship" (App. 8a), the Seventh Circuit now holds that "These are not acts of production" (*id.*). And it does so without even mentioning the *Blue Star* decision.

The *Montgomery Ward* decision, in which the Seventh Circuit also broadly construed the term "production," is not mentioned in its instant decision either. The question there was whether the President's seizure powers in the War Labor Disputes Act extended to a retail department store and mail order business, and it turned upon the meaning of the word "production" as used in that Act. Even though the War Labor Disputes Act did not contain the broad definition of the Fair Labor Standards Act, the Seventh Circuit, nevertheless, adopted the Fair Labor Standards Act's definition as construed in the *Western*

Union case, *supra*. The court said that the result would be the same without the definition in Section 3 (j) for "what definition of the word 'production' could otherwise be given when it is used in addition to the word 'manufacture'?" (150 F. 2d at 379).

Thus, the decision in the instant case, aside from its conflict with other circuits, cannot fail to cause confusion in the district courts within the Seventh Circuit.

3. The decision below, both in its result and in its reasoning, is also patently inconsistent with this Court's decisions. In a uniform line of decisions, this Court has held this Act applicable to custodial and maintenance employees guarding and servicing buildings and facilities used in the production of goods for commerce. *Arsenal Building Corp.* v. *Walling* and *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Borella* v. *Borden Co.*, 325 U. S. 679; *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Armour & Co.* v. *Wantock*, 323 U. S. 126; *Schulte Co.* v. *Gangi*, 328 U. S. 108. Except for the fact that, in most of these cases, the buildings were used for the physical manufacturing of goods, as distinguished from "production of goods" in its broader sense, the employees held within the coverage of the Act are indistinguishable from the employees involved in the instant case. Certainly they were no more closely integrated with the interstate commerce involved, and in some cases were far less closely integrated.

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The process of reasoning by which the Seventh Circuit reached an opposite conclusion in the instant case, both in its construction of the meaning of "production" and in its ruling that physical contact with the goods moving in commerce is required for coverage, plainly conflicts with this Court's decisions.

The Seventh Circuit's confusion in this case is perhaps best shown by its reliance on *Western Union* v. *Lenroot*, 323 U. S. 490, as supporting its conclusion that "handling" and "working on" include only steps in manufacture itself. The *Western Union* decision clearly holds that all "handling," "whether manufacture or not," falls within the Act's definition of "produced," except "the handling or working on which accomplishes the interstate transit or movement in commerce itself" (323 U. S. at 503) by "telegraph companies, railroads, interstate news agencies, and the like" (*id.* at 506). The reason for the exception is that Section 15 (a) (1) of the Act expressly provides that its "hot goods" provisions shall not apply to "any common carrier for the transportation in commerce" of "any goods not produced by such common carrier" (323 U. S. at 504). Thus, far from supporting the narrow view of "production" adopted by the decision below, the *Western Union* decision specifically refutes it.

Also plainly inconsistent with the views of this Court as expressed in *Borden Co.* v. *Borella*, 325

U. S. 679, is the reasoning by the court below that acts which "do nothing to affect the character of the articles themselves" are "not acts of production" (App. 8a). In the *Borden* case, which deals with the coverage of maintenance and custodial employees of an office building where "the articles themselves" were in no way physically handled, this Court pointed out that Section 3 (j) defines the term production "not only in the physical sense of manufacturing, mining and handling but also in the more general sense of producing or 'in any other manner' working on goods" (325 U. S. at 684). It is thus clear that production "is not simply the manual, physical labor involved in changing the form or utility of a tangible article" (*id.* at 683).

4. The decision below further conflicts with this Court's decisions and the decisions of other courts of appeals (and, indeed, again with its own previous decisions) in its holding that "communication" must be between employees of different employers in order for it to constitute "commerce." This ruling rests on the assumption that the Act applies only to commercial transactions or "trade." The court reasoned that "it takes two to make a trade," and "these two must be the employer and another person or firm with which he is dealing" (App. 13a).[1] This

[1] It may be noted that the court below was also in error in assuming that the interstate communication was limited to communications between respondent's own employees. While

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assumption is contrary to *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497; *Bodden* v. *McCormick Shipping Corp.*, 168 F. 2d 715 (C. A. 5), [illegible] v. *Summit King Mines*, 143 F. 2d 926 (C. A. 9); *Darr* v. *Mutual Life Insurance Co.*, 169 F. 2d 262 (C. A. 2), certiorari denied, 335 U. S. 871; and *Bell* v. *Porter*, 159 F. 2d 117, 119 (C. A. 7), certiorari denied, 330 U. S. 813. It also ignores the Act's definition of "commerce" which includes "transportation, transmission, or communication" as well as "trade."

In the *Powell* case, this Court specifically repudiated virtually the same construction with respect to "transportation" as the Seventh Circuit has now adopted with respect to "communication." It was urged in the *Powell* case that since the munitions were produced solely for the Government's use in the national defense and came into the Government's possession before their subsequent interstate shipment, the interstate transportation was not commerce because it was not for any trade or commercial purpose. The Court, however, found "no merit in an interpretation of the Act which would exclude from its coverage those employees who were en-

---

this type of communication is described specifically and in detail in the district court's findings, there is also a more general, and unchallenged, finding that respondent's "employees in [respondent's] central office also make calls to and receive calls from points in States other than Illinois and Indiana, depending on the circumstances of the business" (Fdg. 39; R. 115).

gaged in the production of munitions for interstate transportation for use or consumption, as distinguished from transportation of them for sale or exchange" (339 U. S. at 512).

The Seventh Circuit itself, even prior to the *Powell* decision, made the same ruling in a similar case, stating flatly that "interstate commerce is not limited to interstate trade." *Bell* v. *Porter, supra,* 159 F. 2d at 119; see also the Seventh Circuit's recent reaffirmation of this ruling in *Mitchell* v. *Pilgrim Holiness Church Corporation,* 210 F. 2d 879, certiorari denied, 347 U. S. 1013.

Other courts of appeals have also rejected the concept that "commerce" must be "trade" to be covered by the Act. In reversing a lower court which denied coverage because the rebuilding and selling of a single surplus yacht was not part of a trade or business, the Fifth Circuit, in *Bodden* v. *McCormick Shipping Corp.,* 188 F. 2d 773 citing the *Powell* case, held, "whether or not, therefore, the transportation of goods is 'commerce' within the definition of the Act, does not depend upon whether such transportation is in connection with a trade or business." Prior to the decision in the *Powell* case, the Ninth Circuit also had so ruled in *Fox* v. *Summit King Mines,* 143 F. 2d 926, when it held that gold bullion produced in one State and mailed to a United States mint in another State consti-

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tuted "production of goods for commerce" under this Act, citing *inter alia International Textbook Co.* v. *Pigg*, 217 U. S. 91; and *Caminetti* v. *United States*, 242 U. S. 470, and concluding that "it is well settled that transmission through the mails is interstate commerce * * * and that it is immaterial whether or not the transportation is commercial in character" (143 F. 2d at 926). In *Darr* v. *Mutual Life Insurance Co., supra*, the Second Circuit held that insurance policies were goods produced for commerce even though the transportation occurred between the home office and the branch office.[2]

The narrow ruling on interstate communication in the instant case is also inconsistent with this Court's decisions in *North American Co.* v. *S. E. C.*, 327 U. S. 686 (where it was held that a holding company's use of the "mails and facilities of interstate commerce" in order to "maintain its other relationships and contacts with its own subsidiaries" constituted commerce (327 U. S. at 694–695)); and *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128, where the Court ruled that "interstate communication of a business nature, whatever the

[2] The only other decision precisely on this point is a district court decision which also reached the opposite result from that of the Seventh Circuit in the instant case. In *Walling* v. *Paramount-Richards Theatres*, 61 F. Supp. 290 (E. D. La.) the court held that telephone operators who received and transmitted long distance calls with out-of-state theaters owned by their employer were engaged in commerce.

means of such communication, is interstate commerce * * *."

CONCLUSION

It is apparent that the decision below is not only in direct conflict with decisions of other courts of appeals as well as at variance with the decisions of this Court, but that its reasoning reflects serious confusion and misapprehension of settled principles for determining the scope of this Act's coverage. The decision in the instant case therefore requires review by this Court, not only to correct the error in the result of this particular case, but also to avoid serious unsettling of the law with respect to important areas of the Act's coverage.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor,
United States Department of Labor.

JULY 1954.

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APPENDIX

1. *Opinion*

In the United States Court of Appeals for the Seventh Circuit

No. 10936. October Term, 1953, January Session, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR,
PLAINTIFF-APPELLEE

v.

JOYCE AGENCY, INC., A CORPORATION,
DEFENDANT-APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

March 29, 1954

Before MAJOR, *Chief Judge,* and SWAIM and SCHNACKENBERG, *Circuit Judges*

SCHNACKENBERG, *Circuit Judge:* This is an appeal by the defendant, Joyce Agency, Inc., from a judgment entered on May 7, 1953, by the United States District Court for the Northern District of Illinois, Eastern Division, finding that the defendant has violated sections 7 and 15 (a) (2) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. §§ 201, et. seq., as amended, 63 Stat. 910), and ordering, pursuant to section 17, that the defendant be enjoined from further

violating the provisions of section 15 (a) (2) of the Act.

The question for decision is whether defendant's employees were engaged in interstate commerce or in the production of goods for interstate commerce at four warehouses of Goldblatt Bros. and at defendant's central office, so as to bring them within the coverage of the act.

From the parties' stipulation of facts the following situation appears to have existed at all times hereinafter mentioned.

Defendant is an Illinois corporation with its central office at 343 South Dearborn Street, Chicago. It engages in the business of furnishing watchman, guard, detective, fire inspection and shopping service to Goldblatt Bros., Inc., hereinafter called "Goldblatt", and employs 72 persons.

Goldblatt owns and operates a chain of 14 retail department stores. Of these stores, 10 are in the city of Chicago and one in each of the cities of Joliet, Illinois, Hammond, Gary, and South Bend, Indiana. It has a central office in Chicago, Illinois, where the administrative work in connection with Goldblatt's organization is performed, including the purchase of various kinds of merchandise usually found in a large department store. To service its 14 department stores, Goldblatt maintains in Chicago, Illinois, warehouses at 3913 South Wentworth Avenue, 3161 South Ashland Avenue, 201 East 63rd Street, and 328 South Wabash Avenue. At these warehouses goods are received and stored and thereafter shipped to the defendant's various retail stores. Most of the goods received are from points outside Illinois

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and a substantial part of the goods shipped to retail stores is to those located in Indiana. At one of the warehouses, which is known as the Ashland warehouse, there are also a furniture renovating shop, a radio and television clinic, a carpet and linoleum department, and a sewing machine department, as well as a garage where nine persons are employed by Goldblatt in maintaining its motor transportation fleet.

Defendant's employees include guards and watchmen who guard the warehouses and their contents against all risks, including fire, and the loading and unloading of goods on the loading platforms of the warehouses, check all packages being carried out, keep records of the names of people working after closing hours for the use of the watchmen, open railroad doors to receive freight cars during the night, control ingress and egress of trucks in and out of the garage, and about 5 a. m. check out a truck carrying advertising material to the Indiana stores. Certain guards check the locks and seals on trucks before permitting them to unload or to leave the warehouses when loaded. Guards performing this particular service will be hereinafter referred to as the "seal-checking guards." Defendant's employees do not physically handle the goods received or shipped, except insofar as they may handle stolen goods recovered by them, valued at approximately $300 per year.

The furniture renovating shop reconditions, upholsters, repairs, replaces broken parts, assembles, refinishes and polishes furniture which has been damaged while on display in the stores or in transit. The clinic removes television and

radio sets from their cases, repairs new, display and customers' sets. The carpet and linoleum department cuts carpets and linoleums to size, edges and binds carpeting and prepares carpets and linoleum for laying. The sewing machine shop unpacks sewing machines and their accessories and cabinets, whereupon it attaches the accessories to the machines and the latter are tested and then installed in cabinets or portable cases.

Defendant has two watchmen at Goldblatt's Lexington bakery and the parties agree that their activities constitute production of goods for commerce and hence they are covered by the act.

Defendant employs about ten persons in its central office. They perform administrative work in connection with defendant's furnishing watchman, guard, detective, fire inspection and shopping service to Goldblatt. They hire, assign and direct the work of all employees employed by defendant in Goldblatt's warehouses and stores. At the central office employees maintain all the books and records in connection with defendant's business. Defendant's payroll is kept there and from there weekly bills are sent to Goldblatt for the payroll plus social security and unemployment compensation contributions, the latter of which is sent by defendant to the State of Illinois or the State of Indiana and the United States Collector of Internal Revenue. At the central office, as a part of her duties, one employee communicates with the various employees of defendant stationed in the Goldblatt warehouses and stores and advises them when a truck will arrive at a warehouse after closing time. When a bad check

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is cashed in a Goldblatt store, that fact is telephoned to this woman, who, in turn, telephones the same information to defendant's detectives in all Goldb'att stores. There is a direct telephone line from the central office to all Goldblatt stores and warehouses.

Counsel for both parties have in their briefs treated the Fair Labor Standards Act of 1938, as subsequently amended, including the 1949 amendment to section 3 thereof (29 U. S. C. § 203) as governing this case.

Under the plain language of the act we are convinced that plaintiff was required to show that Goldblatt was engaged in the production of goods for interstate commerce and that defendant's employees now under consideration were engaged in occupations directly essential to such production or that they were employees engaged in interstate commerce. *Engebretsen* v. *Albrecht Co.*, 150 F. 2d 602, at 604.

Plaintiff contends that the Goldblatt warehouse employees are engaged in "handling" and "working on" goods intended for interstate shipment, which, under the definition of "produced" in section 3 (j) and the decisions of this court and of the United States Supreme Court, constitutes "production of goods for commerce", and that the employees of defendant, which furnishes the guard, watchman, detective, and fire inspection service for these warehouses, are engaged in a "closely related" process or occupation "directly essential" to such production within the meaning of section 3 (j) and are, therefore, engaged in producing goods for commerce.

Section 3 (j), as amended, reads as follows:

> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

As to the work done in the furniture renovation shop, television and radio clinic, carpet and linoleum and sewing machine shops, there is no production. Such work constitutes the rendering of services upon articles already produced. Insofar as these activities pertain to goods theretofore sold to Goldblatt's customers, they fall within the exemption of a retail servicing occupation in accordance with the Regulations issued by the Wage and Hour Division of the Department of Labor, which provide in Section 779.14 (c) in part as follows:

> Work performed on the customer's own goods where the completed job will not result in the creation of a different product from that which the customer brought in will be considered as "services" for purposes of the exemption, and, if recognized in the particular industry as retail services, will be considered as such in determining the applicability of section 13 (a) (2). For example, the recapping of a tire for a customer, the reupholstering of a chair for a customer, the repairing of an automobile for a customer regardless of the degree of repairs, the rebuilding of a pair of shoes

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> for a customer, the rebuilding of a typewriter for a customer, will be regarded as the performance of services for purposes of the application of Section 13 (a) (2) exemption to retail or service establishments and employees employed by them.

As to those activities relating to Goldblatt's own goods, the work done in the clinic and shops does not create a different product, and hence does not constitute production.

From a consideration of the processes occurring in the warehouses it is inescapable that there is physical touching by Goldblatt's employees of the goods in the warehouses which are intended for movement in interstate commerce. Plaintiff contends also that these goods are "worked on" by Goldblatt employees in the warehouses. The words "handled" or "worked on" include every kind of incidental operation preparatory to putting goods into the stream of commerce. But there is a distinction between handling in transportation, on the one hand, and producing, on the other hand, which is put to naught by a contention such as plaintiff's that by definition everyone who handles goods is thereby made a producer. As was said in *Western Union* v. *Lenroot*, 323 U. S. 490, at 504:

> One would not readily impute such an absurdity to Congress; nor can we assume, contrary to the statute, that "produced" means one thing in one section and something else in another. To construe those words to mean that handling in carriage or transmission in commerce makes one a producer makes one of these results inevitable. Congress, we think, did not intend

to obliterate all distinction between production and transportation.

In the warehouses, Goldblatt's employees receive, store, in some cases split up large packages of goods into smaller ones, and re-ship. These are not acts of production. They do nothing to affect the character of the articles themselves. Such handling is not production. There is no "working on" the goods by these employees. It will be noted, therefore, as a matter of fact that in the case at bar the employees of Goldblatt do not produce any goods in these warehouses. There being no production in the warehouses by Goldblatt employees, it cannot be said that any duties of defendant's employees on said premises are performed in any process or occupation related or essential to the production of goods, within the meaning of section 3 (j).

In *Engebretsen* v. *Albrecht Co., supra,* relied upon by plaintiff, this court concluded that a janitor and watchman performed a service essential to an operation which the court found to be the production of goods for commerce, and, therefore, held that that employee was covered by the act. That case is not controlling here where we find there was no production of goods for commerce carried on in the Goldblatt warehouses.

Plaintiff also contends that the receiving, handling, and shipping of goods interstate at the Goldblatt warehouses constitutes engagement "in commerce" and that the guards, watchmen, detectives and fire inspectors, who are employed by the defendant to furnish a highly integrated fire and theft protection service at such warehouses, who control the departure of interstate shipments

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and who protect the actual transportation of the goods, are "engaged in commerce."

The real test as to defendant's employees is whether they (the employees themselves) are engaged in an interstate commerce activity. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517. We must look to the employee's activity rather than the employer's activity, so far as "engaged in commerce" determines liability. *Engebretsen* v. *Albrecht Co., supra,* at page 605. At the outset of this part of the discussion, it is to be noted that the seal-checking guards examine the seals on trucks before incoming trucks are unloaded and after outgoing trucks are loaded and sealed. Until incoming trucks are actually unloaded and the contents deposited on the warehouse platform they are in interstate commerce, and after outgoing trucks are loaded and sealed they are also in interstate commerce. The seal-checking guards in performing their function of checking these seals in the interest of security of the contents of the trucks are engaged in interstate commerce and are, therefore, subject to the act. *Walling* v. *Goldblatt Bros., Inc.,* 128 F. 2d 778, at 782.

Defendant admits in its brief that some of the Goldblatt warehouse employees are involved in interstate commerce (appellant's brief, 50). The facts in this case show, however, that none of the employees of defendant working at the warehouses, except the seal-checking guards, is himself engaged in commerce.

It will be noted that section 7 (a) of the act (29 U. S. C. § 207 (a)) provides:

> (a) Except as otherwise provided in this section, no employer shall employ any of

> his employees who is engaged in commerce * * * for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

In *Carrigan* v. *Provident Trust Co. of Philadelphia,* 153 F. 2d 74, the court in considering whether a bank guard was subject to the act, said, beginning at page 74:

> In § 3 (j) 29 U. S. C. A. § 203 (j), "production" is broadly defined * * *. "Commerce" on the other hand, is narrowly limited in § 3 (b), 29 U. S. C. A. § 203 (b) * * *
>
> An important distinction between the two definitions is evident. Congress described "production" to include acts merely necessary to the production of goods. "Commerce", on the other hand, is so closely circumscribed that acts merely necessary to commerce are not included. The wide variation in the scope of the two terms has been frequently noted.

The court cited *McLeod* v. *Threlkeld,* 319 U. S. 491, saying that there, at 497, it was declared:

> [that] The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the

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other phrase, "production of goods for commerce."

* * * * *

Only one question is involved here, namely, is appellant "engaged in commerce" within the meaning of the Fair Labor Standards Act.

This court held in *Blumenthal* v. *Girard Trust Co.*, 3 Cir. 1944, 141 F. 2d 849, that a caretaker or janitor of a building, containing at least one tenant engaged in interstate commerce, was not an employee within the terms of the Act. * * *

As the courts have consistently maintained, it is the work of the employee and not the nature of his employer's business that determines the applicability of the Act. * * * That the employer's entire business is not interstate in character is unimportant so long as a substantial part of the employee's work relates to the interstate movement of goods. *Walling* v. *Jacksonville Paper Co.*, 1943, 317 U. S. 564, 572. That a building is wholly occupied by an employer, whose business is partly interstate in character, or only partially occupied by such an employer, is immaterial with respect to the status under the Act of a building guard. It would seem that the instant case cannot be distinguished in character of fact from its predecessors in this court unless appellant's duties of guarding appellee's bank building are "so closely related to the movement of the commerce as to be a part of it." * * *

But for a rather remote possibility that the law would be violated by a person or persons violently and forcefully breaking into the bank premises with the intent of robbery, or that some emergency should

> arise as a fire or leaky pipe, the watchman's services could have no effect upon commerce, and even then the effect of the watchman's acts would be negative and not acts in commerce. He had no hand whatever in the affirmative acts which constitute commerce.

There is nothing stated in *Carrigan* v. *Provident Trust Co., supra,* which is inconsistent with the holding in *Walling* v. *Goldblatt Bros., Inc.,* 128 F. 2d 778.

Accordingly, we hold that none of the defendant's employees in the warehouses, with the exception of the seal-checking guards, is covered by the act.

As to the employees in defendant's central office, it appears that there is one employee who gives a substantial part of her time to making and receiving telephone calls to and from defendant's guards at the Goldblatt warehouses and stores, some of the latter being in the State of Indiana. It will be noted that these telephone calls are from and to persons entirely in the service of defendant. When employees talk to each other in performing their duties for their employer, they are not engaged in commerce as that word is used in the act now under consideration. That is true whether they sit at adjoining desks or are at the opposite ends of a telephone wire and regardless of whether that wire crosses state lines. This is still true even though another, who owns the wire, may be engaged in commerce in the transmitting of the sound of human voices over that wire. Section 3 of the act (29 U. S. C. § 203) declares that "commerce means trade, commerce, transportation, transmission, or communi-

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cation" interstate. As was said in *Fleming* v. *Jacksonville Paper Co.*, 128 F. 2d 395, at 398:

> Transportation is only a part of it. Trade is another part, and according to the old maxim, it takes two to make a trade. Importer as well as exporter, buyer as well as seller, is a participant; and ordering and paying for goods are included.

If it takes two to make a trade, these two must be the employer and another person or firm with which he is dealing. Communication means from one person to another; that is from the employer to some other person or firm. It cannot reasonably be said to mean a communication by one of the employees of an employer to another employee of the same employer. In the case at bar, the person doing the telephoning to points in another state did not call anyone outside of the defendant's own staff of employees. There was no communication within the definition of commerce contained in the act. Neither by the statutory definition nor as commonly understood does "commerce" include communication by word of mouth between the servants of a common employer in the course of the latter's business. Telephoning by an employee to persons not in the employer's organization, on behalf of his employer, for the benefit of a third party with whom the employer has a contract for such service, would be an act in commerce. But that is not the factual situation which confronts us. It follows that the telephoning done by the employee in question does not bring her under the act.

This conclusion is strengthened by the fact that this particular employee is not engaged in selling

and delivering across state lines or at buying and receiving across state lines, and hence would not fall within the category referred to in *Fleming* v. *Jacksonville Paper Co., supra,* at page 398, where the court said:

> Those who work either at selling or delivering across State lines, or at buying and receiving across State lines, are employed in commerce, whether they write the letters, keep the books, or load and unload or drive the trucks.

There are other employees in the central office of defendant. Their duties include the supervision of the various guards and watchmen stationed by defendant in the Goldblatt warehouses and stores, as well as the keeping of payroll records and the making of payments to said employees of salaries, less tax deductions. Inasmuch as the only employees in this group serviced by the central office who are engaged in interstate commerce are the seal-checking guards, of whom there are only three, and two watchmen at the Lexington bakery, which is engaged in production, and since the record is silent as to the amount of time actually expended by the employees in the central office in connection with these five employees, the plaintiff has not established that in connection therewith central office employees are devoting a substantial part of their time to these five employees (*Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, at 572 and hence this court cannot say that the said central office employees are covered by the act. In all other respects it is clear on this

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record that none of the central office employees of defendant is subject to the act.

For the reasons above stated, we conclude that as to the seal-checking guards the decree of the court below is affirmed and in all other respects it is reversed.

Affirmed in part; reversed in part.

2. *Judgment*

Monday, March 29, 1954

Before Hon. J. EARL MAJOR, *Chief Judge,* Hon. H. NATHAN SWAIM, *Circuit Judge,* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 10936

JAMES P. MITCHELL, SECRETARY OF LABOR, PLAINTIFF-APPELLEE,

v.

JOYCE AGENCY, INC., DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by Counsel.

On consideration whereof: It is ordered and adjudged by this Court that the Judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed as to the seal-checking guards, and that the said Judgment in all other respects be, and the same is hereby, reversed.

3. *Order denying rehearing*

Friday, April 23, 1954

United States Court of Appeals for the Seventh Circuit

CHICAGO 10, ILLINOIS

Before Hon. J. EARL MAJOR, *Chief Judge*, Hon. H. NATHAN SWAIM, *Circuit Judge*, Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 10936

JAMES P. MITCHELL, SECRETARY OF LABOR, PLAINTIFF-APPELLEE,

v.

JOYCE AGENCY, INC., DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN LISTRICT OF ILLINOIS, EASTERN DIVISION

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

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Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of October 26, 1949, c. 736, 63 Stat. 910; 29 U. S. C. 201 *et seq.*:

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3 (j) 3, 16, 35, 42
7 (a) 3, 20

Miscellaneous:

95 Cong. Rec. 14874 42
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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 230

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOYCE AGENCY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The memorandum opinion of the district court (R. 92–100) is reported at 110 F. Supp. 918, and the "Findings of Fact and Conclusions of Law" appear in the record at pages 100 to 118. The opinion of the court of appeals (R. 125–133) is reported at 211 F. 2d 241.

JURISDICTION

The judgment of the court of appeals (R. 133) was entered on March 29, 1954, and petitioner's petition for rehearing was denied on April 23,

1954 (R. 135). Certiorari was granted on October 14, 1954 (R. 137). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether guards and watchmen, and related clerical workers, employed to furnish theft and fire protection to the warehouses of an interstate chain-store organization, where large amounts of merchandise from out-of-State sources are regularly received, unloaded, packaged and otherwise handled, and shipped out of the State, are engaged "in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of October 26, 1949, c. 736, 63 Stat. 910; 29 U. S. C. 201 *et seq.*, are:

Definitions:

> Section 3 (63 Stat. 911): As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *

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(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * *

Maximum Hours:

Section 7 (63 Stat. 912):

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

STATEMENT

This action was brought by the Secretary of Labor pursuant to Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime provisions of the Act. The facts of the case were largely stipulated (Stipulation of Facts, R. 14–58), and the Findings of

Fact by the district court (R. 101–117) are undisputed.

1. Respondent, Joyce Agency, Inc., is an Illinois corporation with its central office and place of business in Chicago, engaged in the business of furnishing watchmen, guard, detective, and fire inspection services to the huge multimillion dollar interstate merchandise system of Goldblatt Brothers, Inc. (Fdg. 1; R. 101; opinion of dist. ct., R. 93).

Goldblatt Brothers, Inc. ("Goldblatt") owns and operates a chain of fourteen retail department stores, eleven of which are located in Illinois and three in Indiana, and four large warehouses in Illinois from which merchandise is distributed to the stores both in Illinois and Indiana (Fdgs. 2, 4, 5, 15, 27, 32; R. 101–102, 106, 110, 111). The total annual sales volume of Goldblatt's stores exceed $90,000,000 (Fdg. 2; R. 101). Most of this merchandise is distributed from the four warehouses directly to the stores by means of Goldblatt's own motor transportation system (Fdg. 3; R. 101, 93).

Each of the four warehouses regularly and daily receives in interstate commerce from points outside of the State of Illinois large quantities of merchandise, having an annual sales value of millions of dollars. A "very large percentage of these goods are distributed from the four warehouses directly to stores in Indiana" (R. 93). At the "Wentworth Warehouse," for example, more

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than 30 million dollars worth of merchandise is received and shipped per year, 70 percent of which is regularly received from out-of-State sources, and 20 percent of which is shipped to the Indiana stores (Fdg. 5; R. 102). At the "Ashland Warehouse and Garage," 12½ million dollars worth of merchandise is received and handled, 65 percent of which is regularly received from out-of-State sources, and 20 percent of which is shipped to the Indiana stores (Fdg. 15; R. 106). At the "63rd Street Warehouse", over 10 million dollars worth of merchandise is received and handled, 50 percent of which is received from out-of-State sources, and 17 percent of which is shipped to Indiana stores (Fdg. 27; R. 110). At the "Wabash Warehouse", more than 18 million dollars worth of merchandise is received and handled, 22 percent of which comes from out-of-State sources, and approximately 2 percent of which is shipped to Goldblatt customers outside of Illinois (Fdg. 32; R. 111).

In order to conduct this vast interstate business, Goldblatt operates and employs extensive instrumentalities of interstate commerce. It maintains its own "motor transportation system consisting of 127 trucks, 70 trailers, and 17 tractors" (Fdg. 3; R. 101, 93). Each of the four warehouses has huge receiving and shipping platforms and truck pits (R. 16–17, 29–30, 43, 47); they receive well in excess of 125 trucks and trailers each day

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(Fdgs. 8, 21, 30; R. 102, 107, 110, 47). Railroad sidings adjoin the "Wentworth", "Ashland" and "63rd Street" warehouses (R. 16, 29, 43); at these an average of 15 freight cars are received each week (R. 18, 32, 44).

Goldblatt employs approximately 400 employees at these four warehouses to receive, unload, check, handle, assemble, repack, and reship the merchandise (Fdgs. 7, 17, 29, 33; R. 102, 106, 110, 112). Typical of the operations involved at the Goldblatt warehouses are those performed at "Wentworth," which are summarized in the district court's Findings of Fact as follows: "The receiving department employees deposit these goods on the receiving platform and on freight elevators adjacent to and opening onto the railroad siding. Shipments from 50 to 60 trucks and trailers are received daily and an average of four railroad freight cars is received each week. 'Break-bulk' shipments, which are received daily, are taken after unloading directly from the receiving platform to the shipping platform for immediate forwarding to a particular Goldblatt store designated on the common carrier freight bill for such shipment. All other goods, after being unloaded, are moved to the various stock departments and are unpacked, counted, checked, marked, and placed in stock. Orders for all Goldblatt stores are filled from said stock departments in the following manner: The merchandise

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is picked from stock, placed in bins, checked and packed in containers, or placed on racks; sorted and checked by store, taken to the 'store runs' on the shipping platform, from which they are loaded onto Goldblatt's trucks and trailers, and transported to Goldblatt's stores, including the three Indiana stores. Orders not completely picked or packed by quitting time are left in that incompleted state in their respective stock departments until the next working day. Assembled goods are left in the 'store runs' until the next working day. Trucks or trailers which are loaded and sealed, partially loaded, or empty also remain in the warehouse until the next working day. An average of 75 Goldblatt trailers is loaded weekly at the shipping platform and of this number approximately 15 trailers a week go to Goldblatt's Indiana department stores. Goods are daily transported to Goldblatt's stores, including the stores in Hammond, Gary, and South Bend, Indiana" (Fdg. 8; R. 102–103).

2. Respondent Joyce Agency furnishes the watchmen and guards to protect the merchandise and the warehouses during all of these operations. While the individual duties of the guards, watchmen, and detectives vary somewhat at the different warehouses, the protection service rendered "is basically the same in all four warehouses" (dist. ct. opinion, R. 94). "The primary difference is found in the number of employees used by de-

fendant at the various warehouses to administer this protective service," which "seems to be determined by the volume of business activity at each establishment" (*ibid.*).

As the district court found, respondent Joyce Agency "offers Goldblatt Brothers a highly systematic protection service, which exceeds the normal watchman activity" and includes maintaining "a close watch over all stages of the respective operations on both the receiving and shipping platforms," as well as "patrol [of] the entire premises, guard[ing] the goods in all stages of being received, handled, stored, prepared for shipments and shipped including those enroute to the shipping platform and on the receiving and shipping platforms, as well as in the railroad cars and motor trucks and trailers in the truck pit, together with the cars, trucks and trailers themselves from fire, theft and other damage" (R. 94).

The close integration of the duties of respondent's employees in the warehouse operations of Goldblatt is well illustrated by the district court's finding as to the procedure for handling valuable goods at the "Wentworth" warehouse (Fdg. 11; R. 103–104). The shipping platform guard takes "personal custody" of these "'valuable goods' (goods particularly susceptible to theft, such as cigarettes, furs, jewelry, guns, and nylon hosiery) * * * at a designated place on the shipping platform, guarding them at all times while they are

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on the platform and throughout the loading process until the trailer is locked and sealed, and then preparing a shipment memorandum listing the nature of the goods being shipped, department number, number of pieces, bill number, trailer number, and seal number. He gives this memorandum to the [respondent's] Wentworth Warehouse front door guard, who transmits this information to [respondent's] guard or special service man stationed at the Goldblatt store to which the goods are being shipped" (Fdg. 11; R. 103–104).

Respondent coordinates the service it renders to Goldblatt through a central office in Chicago which performs "the administrative work integrating [respondent's] furnishing of night watchman, guard, detective, fire inspection, and shopping service to Goldblatt" (Fdg. 36; R. 113). Since respondent testified that it had only one other client to whom it furnished two or three persons out of a payroll of 85 people (R. 70–71), practically the entire work of the bookkeepers, statement clerk, and switchboard operator concerned herein was in connection with the service rendered to Goldblatt.

The duties of the switchboard operator have been performed by the bookkeeper four days and by the statement clerk one day each week (Fdgs. 37, 38, 39; R. 113–115). As switchboard operator, the bookkeeper and statement clerk "handle all incoming and outgoing calls through the switch-

board in [respondent's] central office, including all calls between [respondent's] central office and [respondent's] employees stationed in all Goldblatt warehouses and stores" (Fdg. 39; R. 114). Calls to and from Goldblatt's Indiana stores are placed daily through the switchboard at Goldblatt's State Street store in Chicago which has a direct line to each of them (Fdg. 39; R. 114, 64–65). "Employees in respondent's central office also make calls to and receive calls from points in States other than Illinois and Indiana, depending on the circumstances of the business" (Fdg. 39; R. 115).

3. The district court held that the Act covered all of respondent's guards and watchmen employed at Goldblatt's warehouses, and the clerical workers performing the administrative work in connection with furnishing such guards, including the switchboard operator (R. 117). The activities of respondent's guards and watchmen in the various warehouses, concluded the district court, "contribute so materially and directly to interstate commerce as to be a part thereof * * *. They are the integral components of a highly systematic security system which is as important and vital part of this commerce as traffic control and other warehousing and shipping techniques. This is borne out by the fact that the protection service is given not only at the warehouse premises but also during the course of transportation

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itself, by means of telephonic communications regarding shipments to designated stores. The fact that the night watchmen assume none of these operational duties, but are limited, more or less, to the patrolling and guarding of the premises during the night hours does not withdraw them from interstate commerce. They guard against fire, theft, and other hazards, during a time of greater need, not only the wares, which are in the process of being received as well as shipped in interstate commerce, but also the vehicles, which are the instrumentalities of that commerce" (R. 95–96).

The trial court concluded that the guards at the warehouse were also engaged "in the production of goods for commerce because they are engaged in a 'closely related process or occupation directly essential to the production' of goods for commerce which is being carried on at the various warehouses" (R. 96). Respondent's employees at its central office were also held by the trial court to be engaged in both interstate commerce and production of goods for commerce, both by reason of their direct "interstate telephone activity" and "interstate use of the mails" as well as by reason of the fact that their activities "effectuate the coordination, integration and orderly administration of the defendant's protection service at the warehouses, where there is production of goods for commerce" (R. 97–98).

4. The court of appeals reversed on the ground that neither guards and watchmen employed at Goldblatt's warehouses where goods are regularly received, handled and shipped in interstate commerce, nor the office and clerical employees performing the necessary administrative work in connection with furnishing such guard service, are engaged "in commerce" within the meaning of the Act (R. 131, 133); that coverage cannot be sustained for these employees on "production" grounds since Goldblatt's handling of goods in this case does not constitute "production" (R. 129); and that the making of interstate telephone calls between employees of the same employer is not "communication" in interstate commerce (R. 132).

Out of a total of approximately 85 employees, the only employees held covered by the court of appeals were two guards at Goldblatt's bakery (who were conceded to be engaged in production of goods for commerce), and three "seal-checking guards," who check the lock and seals on trucks before permitting them to unload or to leave the warehouses when loaded. The office and clerical employees were disposed of on the ground the the record did not establish that they "are devoting a substantial part of their time to these five employees" (R. 133). The other guards, the court stated, "do not physically handle the goods received or shipped" (R. 126).

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SUMMARY OF ARGUMENT

The unchallenged findings of fact establish that respondent's employees furnished fire and theft protection to the extensive interstate operations continuously carried on at the warehouses of the Goldblatt Company's huge interstate chain of department stores; that they furnish this protection to the "goods in all stages of being received, handled, stored, prepared for shipments and shipped," and to "all stages of the respective operations on both the receiving and shipping platforms"; and that this protection is an "integral" and "vital part" of the interstate warehousing and shipping operations (R. 94, 95). On these facts, respondent's guards and related clerical workers are clearly "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

A

1. It is well settled by this Court's decisions that warehouse employees of an interstate chain-store organization engaged in receiving and unloading out-of-State shipments and in preparing goods for shipment across state lines, and central office and clerical employees whose work relates substantially to such interstate activities, are engaged "in commerce." *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Phillips Co.* v. *Walling*, 324 U. S. 490. The very warehouse activities

for which respondent's employees here furnish protection services have specifically been held to be "in commerce" in previous litigation. *Walling* v. *Goldblatt Bros.*, 128 F. 2d 778 (C. A. 7), certiorari denied, 318 U. S. 757; 152 F. 2d 475 (C. A. 7), certiorari denied, 328 U. S. 854; reaffirmed in *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329, 331 (C. A. 7), certiorari denied, 332 U. S. 855. The fire and theft protection functions here are plainly no less a part of the interstate commerce at the warehouses than the work of the warehouse and office employees in the *Jacksonville Paper* and *Phillips* cases, *supra*, and, as in *Phillips*, respondent's employees perform these functions "in the very midst of the stream of interstate commerce" (324 U. S. at 497).

The courts of appeals, including the Seventh Circuit itself prior to its decision in the instant case, have consistently held that guards and watchmen protecting interstate distribution of goods and premises and facilities used in interstate transportation are engaged "in commerce." *Walling* v. *American Stores Co.*, 133 F. 2d 840 (C. A. 3) affirming 42 F. Supp. 511, 524 (E. D. Pa.); *Walling* v. *Sondock*, 132 F. 2d 77 (C. A. 5), certiorari denied, 318 U. S. 772; *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5); *Engebretsen* v. *E. J. Albrecht Co.*, 150 F. 2d 602 (C. A. 7); *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4); *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (C. A. 4). The *American Stores*, *Russell*, and *Sondock* cases concerned watchmen guarding interstate distribution

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transactions indistinguishable from those in the instant case. The opinion of the court of appeals below makes no attempt to distinguish these cases, which are squarely in point factually and clearly represent a correct application of this Court's decisions construing the scope of the "in commerce" coverage.

2. Instead, the court below erroneously relied upon two cases which involved entirely different factual situations and are wholly inapposite here. *Carrigan* v. *Provident Trust Co.*, 153 F. 2d 74 (C. A. 3) and *McLeod* v. *Threlkeld*, 319 U. S. 491. There is also an untenable implication in the decision below (limiting coverage to the "seal checking guards") that the "in commerce" coverage is limited to those "physically" in contact with the goods or vehicles moving in commerce. The above cited authorities and numerous other decisions make it clear that it is not such physical contact, but the employee's practical and integrated participation in the commerce, that controls determination of coverage.

Similarly, it is settled that employees who are themselves engaged in commerce are not removed from coverage because their employer may not be directly or wholly engaged "in an industry partaking of interstate commerce". "The provisions of the Act expressly make its application dependent upon the character of the employees' activities". *Kirschbaum Co.* v. *Walling*, and *Arsenal Building Corp.* v. *Walling*, 316 U. S. 517, 524;

Walling v. *Jacksonville Paper Co.*, 317 U. S. 564; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 184–185; see also *Mitchell* v. *Famous Realty, Inc.*, 211 F. 2d 198 (C. A. 2), certiorari denied, No. 141, this Term, October 14, 1954, and *Walling* v. *Sondock, supra,* both involving watchmen furnished by an agency which was not itself engaged in an interstate business.

B

1. Respondent's employees are also engaged "in the production of goods for commerce" since their duties are closely related and directly essential to the handling and preparation of goods for shipment in interstate commerce. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 525; *Borden Co.* v. *Borella,* 325 U. S. 679; *Walton* v. *Southern Package Corp.,* 320 U. S. 540; *Armour & Co.* v. *Wantock,* 323 U. S. 126; *Schulte Co.* v. *Gangi,* 328 U. S. 108.

The court below was plainly in error in holding these decisions inapplicable on the ground that the handling of goods at the warehouses does not constitute "production" because it does "nothing to affect the character of the articles themselves" (R. 129). The word "produced" is broadly defined in the Act to include "handled, or in any other manner worked on" (Section 3 (j)), and it has been settled by this Court that this definition is not limited to "the manual, physical labor in-

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volved in changing the form or utility of a tangible article" (*Borden Co.* v. *Borella*, 325 U. S. 679, 683), but "includes every kind of incidental operation preparatory to putting goods into the stream of commerce," "whether manufacture or not" (*Western Union* v. *Lenroot*, 323 U. S. 490, 503). In the *Borden* case the definition of "production" was held applicable to the maintenance and custodial employees of Borden Company's administrative office building, where "the articles themselves" were in no way physically handled.

The decisions of other courts of appeals, and prior decisions of the Seventh Circuit, have repeatedly held that the very type of warehouse handling of goods here involved constitutes "the production of goods for commerce" within the statutory definition. *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C. A. 8); *Walling* v. *Friend*, 156 F. 2d 429 (C. A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C. A. 8); see also *Mitchell* v. *Famous Realty, Inc.*, 211 F. 2d 198 (C. A. 2), certiorari denied, No. 141, this Term, October 14, 1954; *Bracey* v. *Luray*, 138 F. 2d 8 (C. A. 4); *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5); *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475, 476 (C. A. 7), certiorari denied, 328 U. S. 854; *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329 (C. A. 7), certiorari denied, 332 U. S. 855; *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369 (C. A. 7), vacated as moot, 326 U. S. 690. The identical warehousing functions here in issue

were held by the Seventh Circuit to constitute "production" in previous litigation with the Goldblatt Company. *Walling* v. *Goldblatt Bros., supra,* reaffirmed in the *Blue Star* case, *supra.*

The opinion below misconstrued the *Western Union* decision. The only exception which *Western Union* made to the inclusion of all "handling" within the scope of the statutory definition of "produced" was the handling "which accomplishes the interstate transit or movement in commerce itself," by a common carrier engaged in the business of transporting goods of others.

2. The 1949 Amendments to the Act, which included a modification of Section 3 (j), did not diminish the authoritative value of the above decisions sustaining coverage for guards and clerical employees. On the contrary, the Conference Reports of both Houses of Congress expressly stated the purpose to continue coverage of employees furnishing protective or custodial services for producers of goods, whether employed by the producer himself or by an independent agency.

C

The ruling below that respondent's switchboard operator is not engaged in commerce, because the interstate calls were between employees of the same employer rather than for "trade" purposes, ignores the plain language of the statutory definition of "commerce," which is not limited to "trade," but also includes "transportation, trans-

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mission, or *communication*" (Section 3 (b); emphasis added), and is contrary to the settled judicial interpretation that interstate commerce under the Act is not limited to interstate trade. *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497; *Bodden* v. *McCormick Shipping Corp.*, 188 F. 2d 773 (C. A. 5); *Fox* v. *Summit King Mines*, 143 F. 2d 926 (C. A. 9); *Darr* v. *Mutual Life Insurance Co.*, 169 F. 2d 262 (C. A. 2), certiorari denied, 335 U. S. 871; *Bell* v. *Porter*, 159 F. 2d 117 (C. A. 7), certiorari denied, 330 U. S. 813.

ARGUMENT

RESPONDENT'S GUARDS AND RELATED CLERICAL WORKERS FURNISHING THEFT AND FIRE PROTECTION TO AN INTERSTATE CHAIN ORGANIZATION'S WAREHOUSES AND TRANSPORTATION FACILITIES, WHICH ARE USED DAILY IN THE RECEIPT AND SHIPMENT OF SUBSTANTIAL AMOUNTS OF MERCHANDISE FROM AND TO OUT-OF-STATE POINTS, ARE ENGAGED "IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT

A. RESPONDENT'S EMPLOYEES ARE ENGAGED "IN COMMERCE"

The court of appeals has held that some 80 of respondent's employees connected with the Goldblatt warehouses—guards and watchmen, and the related clerical and administrative personnel (bookkeepers, statement clerk, switchboard operator) (see *supra*, pp. 7–10)—are not "engaged in commerce" and therefore not covered by the

Fair Labor Standards Act.[1] This ruling flatly disregards both the trial court's unchallenged findings and the settled holdings of this and other courts in applying the Act to comparable situations.

1. In findings undisputed by respondent, the district court found that in the conduct of its vast interstate chain of department stores Goldblatt relies on respondent's highly systematic protection service as an "integral" and "vital" part of its interstate warehousing and shipping operations; and that this protection service exceeds the normal watchman activity and includes the responsibility of guarding the "goods in all stages of being received, handled, stored, prepared for shipments and shipped," as well as the premises, trucks, trailers and railroad cars, and of maintaining "a close watch over all stages of the respective operations on both the receiving and shipping platforms" (R. 94).

Concededly, it has been settled in previous extensive litigation that the "in commerce" coverage of the Act extends to the receiving and unloading of out-of-State shipments at Goldblatt's warehouses and to the warehouse activities relating to goods being shipped out of the State.

[1] The coverage of the Fair Labor Standards Act extends to (a) employees "engaged in commerce", as well as (b) to those engaged "in the production of goods for commerce". Section 7, *supra*, p. 3. We discuss "production of goods for commerce" in Point B, *infra*, pp. 33 *ff*.

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Walling v. *Goldblatt Bros.*, 128 F. 2d 778 (C. A. 7), certiorari denied, 318 U. S. 757; 152 F. 2d 475 (C. A. 7), certiorari denied, 328 U. S. 854; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (warehouse employees of wholesale paper company). And it seems equally well settled that this coverage includes central office employees "who work either at selling or delivering across State lines, or at buying and receiving across State lines * * * *whether they write the letters, keep the books,* or load or unload or drive the trucks." [Emphasis added.] *Fleming* v. *Jacksonville Paper Co.*, 128 F. 2d 395, 398 (C. A. 5), affirmed, 317 U. S. 564; *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329, 331 (C. A. 7), certiorari denied, 332 U. S. 855; See also, to the same effect, *Phillips Co.* v. *Walling*, 324 U. S. 490 (warehouse and central office employees of an interstate retail chain store system); *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, rehearing denied, 317 U. S. 706 (rate clerk for interstate motor transportation company).

Like the central office and warehouse employees in the *Phillips* case, *supra*, respondent's employees "are performing wholesale duties in the very midst of the stream of interstate commerce" and "constantly deal with both incoming and outgoing interstate shipments." 324 U. S. at 497–498. And there is no question that a "substantial part" of the activities of respondent's employees has

"related to goods whose movement in the channels of interstate commerce was established by the test" prescribed by this Court in the *Jacksonville Paper* case, *supra*, 317 U. S. at 572.[2] The fire and theft protection functions performed by the employees, which the trial court found to be an "integral" and "vital" part "in all stages" of the interstate commerce at the warehouses (R. 95) (see *supra*, pp. 10–11), are plainly no less a part of that commerce than the writing of letters or keeping of books relating to it. This has been repeatedly and consistently recognized by decisions of various courts of appeals, including the Seventh Circuit itself prior to its ruling in the instant case.

Thus, in *Walling* v. *American Stores Co.*, 133 F. 2d 840, the Third Circuit, in a decision squarely in point here, held that watchmen employed at

[2] The *Jacksonville Paper* test was as follows (317 U. S. at 568): "* * * once the goods entered the channels of interstate commerce, Congress [did not stop short] of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. * * * if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient."

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the warehouse of a chain grocery—to protect precisely the same kind of interstate facilities and receiving, unloading, and checking operations as are here involved—were engaged "in commerce," even when the warehouse did not engage in the additional interstate activity, here present, of making deliveries across state lines. The court said that, since under the principles of the *Jacksonville Paper* case there was a "practical continuity of movement of the goods until they reach the defendant's stores," the conclusion "is that *all* of the defendant's warehouse employees are engaged in commerce within the meaning of the Act" (133 F. 2d at 846). [Emphasis added.] Therefore, in addition to extending coverage to some employees not included by the trial court, it affirmed the trial court's holding that "All employees who rendered services in connection with incoming goods (whether in the actual physical handling of the goods *or in the compilation of records or other operations* pertaining to incoming goods) are subject to the provisions of the Act," including specifically "maintenance men, *watchmen* and janitors * * *" (42 F. Supp. at 524, 525). [Emphasis added.]

And in *Engebretsen* v. *E. J. Albrecht Co.*, 150 F. 2d 602, the Seventh Circuit held that a watchman at the equipment and storage yard of an interstate construction company was engaged "in commerce." Immediately after citing and dis-

cussing *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4), and other "in commerce" cases, the opinion stated (150 F. 2d, at 606):

> *Under repeated decisions* plaintiff's employment as watchman and caretaker was of such character and so intimately connected with the tools and equipment which passed into interstate commerce that it can be properly held that his services were so *essential to such commerce as to become a part thereof* * * *.[3] [Emphasis added.]

In *Slover* v. *Wathen, supra,* on which the Seventh Circuit relied, the Fourth Circuit had held that a watchman guarding interstate barges while under repair was "so closely related to the movement of commerce as to be a part of it within the test prescribed by the Supreme Court * * *" (140 F. 2d at 259). And in *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286, the Fourth Circuit similarly held that the "in commerce" coverage in-

[3] The importance of this holding on "in commerce" coverage was emphasized on remand when the defendant sought to prove that "production" coverage was not applicable. The district court considered this offer of proof immaterial because "the defendant's liability can be predicated on *the sole ground of its having been engaged ir interstate commerce.* The Circuit Court of Appeals, on facts admitted by the defendant * * * held that the District Court was in error in holding that the defendant was not engaged in interstate commerce." *Engebretsen* v. *E. J. Albrecht Co.*, 5 W. H. Cases 900, 10 Labor Cases Par. 63,001 (N. D. Ill.—1946). [Emphasis added.]

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cluded a watchman guarding the construction of a new highway bridge.

Even more squarely applicable are the Fifth Circuit's decisions in *Walling* v. *Sondock*, 132 F. 2d 77 (C. A. 5), certiorari denied, 318 U. S. 772, and *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5). Like the Third Circuit's decision in *American Stores, supra*, pp. 22–23, these cases are practically indistinguishable from the instant case; indeed, the factual situation now before the Court affords an even stronger basis for coverage. In *Sondock*, as here, a watchman agency was involved. It rendered services generally to interstate wholesalers and distributors as well as to producers of goods for commerce. The Fifth Circuit held that the watchmen who guarded and protected the interstate distribution transactions were engaged "in commerce." The same result was reached in the *Russell* case where the Fifth Circuit reaffirmed its holding that "night watchmen who guarded and protected interstate distribution transactions were 'engaged in commerce' " (187 F. 2d at 526).

The *Sondock* decision states the test for determining coverage in this type of case as follows: "* * * * if an employee's services are part of and contribute materially to the consummation of transactions in interstate commerce, the employee is engaged in commerce as defined by the Act" (132 F. 2d at 78). The services performed

by the employees in this case meet that test *a fortiori,* since they are performed exclusively for and are directly integrated into Goldblatt's extensive interstate transactions, and, as the trial court found, are "as important and vital part of this commerce as traffic control and other warehousing and shipping techniques" (R. 95). Respondent's employees protect the very facilities used in the interstate transportation of Goldblatt's goods, at the very time the goods are in the course of interstate movement. Goldblatt employs extensive instrumentalities of commerce in the conduct of its vast interstate business (*supra,* pp. 5–6). It maintains its own "motor transportation system consisting of 127 trucks, 70 trailers, and 17 tractors" (Fdg. 3, R. 101), and has railroad sidings at the "Wentworth," "Ashland," and "63rd Street" warehouses (R. 16, 29, 43). Large receiving and shipping platforms and truckpits adjoin each warehouse[4] (R. 16–17, 29–30, 43, 47). These receive well in excess of 125 trucks and

[4] Indeed, the warehouses (R. 15–17, 29, 31, 42–43, 47) themselves may well be regarded as "instrumentalities of commerce." They perform a service in the interstate movement of goods similar to that which railroad and bus stations perform in the interstate movement of people. The courts have consistently held the "in commerce" coverage under this Act applicable to the maintenance personnel of such terminal facilities. *Hargis* v. *Wabash Railroad Co.*, 163 F. 2d 608 (C. A. 7); *Mornford* v. *Andrews*, 151 F. 2d 511 (C. A. 5); *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E. D. S. C.); *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W. D. Mo.).

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trailers each day (Fdg. 8, 21, 30; R. 102, 107, 116, 47), and an average of 15 freight cars each week (R. 18, 32, 44), transporting goods, more than half of which comes from outside of the State (*supra*, pp. 5–7). These extensive instrumentalities of commerce are certainly embraced within "the farthest reaches of the channels of interstate commerce" throughout which "it is clear that the purpose of the Act was to extend federal control." *Overstreet* v. *North Shore Corp.*, 318 U. S. at 128; *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U. S. 740; *Boutell* v. *Walling*, 327 U. S. 463.

2. The Seventh Circuit in its opinion below made no attempt to distinguish the decisions which involved factual situations closely paralleling the facts of the instant case. It relied instead on *Carrigan* v. *Provident Trust Co.*, 153 F. 2d 74 (C. A. 3), and *McLeod* v. *Threlkeld*, 319 U. S. 491, both of which involved entirely different factual situations.

The *Carrigan* case concerned a night watchman at the branch office of a bank. There were no findings by the trial court that the duties of this watchman had any connection with the interstate aspects of the banking business, and the court of appeals, in affirming the trial court's ruling of no coverage, emphasized that "No act within the scope" of the night watchman's "duty touches any facet of the acts of commerce in which the

bank was engaged" (153 F. 2d at 76). In contrast, here the district court's findings specified in detail how the guards "maintain a close watch over all stages of the respective operations on both the receiving and shipping platforms" and the "important and vital part" their functions serve in the extensive interstate commerce continuously passing through the warehouses. *Supra*, pp. 8–9, 10–11.

McLeod v. *Threlkeld*, 319 U. S. 491, the other case relied upon by the court of appeals below, is even less pertinent. The cook there held not covered by the Act was not himself participating in the interstate transportation of goods or in the maintenance and operation of the interstate instrumentalities themselves; he was simply supplying the personal needs of employees who were so engaged. On the other hand, the employees here, who furnish protection directly to the interstate movement of goods "not only at the warehouse premises but also during the course of transportation itself" (R. 95), "have the immediacy of participancy lacking in the cook of *McLeod* v. *Threlkeld.*" See *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334, 337 (C. A. 9). They are "so closely related to the movement of commerce as to be a part of it within the test prescribed by the Supreme Court in *McLeod* v. *Threlkeld* * * *." *Slover* v. *Wathen*, 140 F. 2d 258, 259 (C. A. 4).

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The suggestion implicit in the decision below (limiting coverage to the "seal checking guards") that the "in commerce" coverage of the Act is restricted to those "physically" in contact with the goods or vehicles moving in interstate commerce (R. 126, 131) is plainly untenable.[5] This Court and the various courts of appeals have repeatedly held "in commerce" coverage available to employees whose physical proximity to the interstate instrumentality or the goods moving in commerce was no closer than that of respondent's employees in the instant case. See *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, affirming the decision of the Fifth Circuit applying the "in commerce" coverage to those who "write the letters, keep the books", as well as to those who "load and unload or drive the trucks." 128 F. 2d 395, 398; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, rehearing denied, 317 U. S. 706, recognizing that a rate clerk for an interstate motor carrier was "engaged in commerce;" *Phillips Co.* v. *Walling*, 324 U. S. 490, affirming coverage of central office employees of a chain store organization. See also *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334, 337 (C. A. 9) (holding the Act applicable to "white collar" workers physically removed from the in-

[5] Respondent makes the same argument (Br. in Opp., pp. 4, 7, 16) in the form of urging that even though a guard may be employed at an establishment involved in commerce his activities are too remote to make his work part of that commerce.

strumentality of commerce on which the construction was being done); *Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (C. A. 2) (applying the Act to estimators and draftsmen performing preparatory paper work for construction work on the instrumentality of commerce); *Walling* v. *Sondock*, 132 F. 2d 77 (C. A. 5), and *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5) (discussed *supra*, pp. 25–26); *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4) (holding covered a watchman guarding interstate barges withdrawn from commerce while under repair); *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (C. A. 4) (upholding coverage of a watchman employed to guard the construction of a new bridge which had never carried interstate traffic and was some distance removed from the highways then being used to carry such traffic, but which when completed was to connect with roads leading to interstate highways).[6]

[6] The *Bennett* and *Slover* cases, among others, plainly show the fallacy in respondent's argument that there have been no holdings in "in commerce" cases that watchmen are covered. Respondent has included in its brief in opposition a chart of cases (pp. 5–6) which, it contends, supports its argument that watchmen and guards are covered by the Act only when the employer is engaged in the production of goods for commerce (pp. 4, 7, 16). In the text we have pointed out the incorrectness of this view both on principle and on authority. With the exception of the *Sondock* case, the chart omits those cases most directly in point; *i. e.*, the decisions holding that the employees of watchman and guard agencies guarding interstate transactions and facilities are engaged in commerce. See *supra*, pp. 22–25, and *infra*, p. 33. The *Sondock* case is listed as holding that the watchmen and

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From any "practical" and realistic point of view, the work of respondent's employees is certainly as "intimately related to interstate commerce" and as much "a part of it" (see *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, at 128, 130) as the work of any of the employees held covered in the above cases. It is clear from the decisions construing the "in commerce" coverage

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guards are engaged in the production of goods for commerce, but the chart does not show that the court also held certain watchmen were engaged in commerce. *Supra*, p. 25. The same omission is made with respect to the *Russell* and *Slover* cases. In the other cases listed in which the watchmen were held to be engaged in the production of goods for commerce, the courts made no holding, one way or the other, regarding "in commerce" coverage.

10 East 40th St. Co. v. *Callus*, 325 U. S. 578, is treated as an "in commerce" case, despite the fact that this Court's decision was plainly premised on the assumption that only the "production" phase of coverage was involved when it ruled that the maintenance employees of an office building occupied by an unrestricted variety of tenants were "too many steps removed from the physical process of the *production of goods* [emphasis added]". The same error is made with respect to *Bartholome* v. *Baltimore Fire Patrol and Despatch Co.*, 48 F. Supp. 98 (D. Md.).

The chart also includes a number of cases such as *Carrigan* v. *Provident Trust Co. of Philadelphia*, 153 F. 2d 74 (C. A. 3), holding that maintenance employees in general office and bank buildings are not engaged "in commerce," because "No act within the scope" of their "duty touches any facet of the acts of commerce in which the bank was engaged" (153 F. 2d at 76). See *supra*, pp. 27–28. In contrast to such cases, the guards and watchmen in the instant case were found by the district court, as we have shown, to be "the integral components of a highly systematic security system which is as important and vital part of this commerce as traffic control and other warehousing and shipping techniques" (R. 95).

of the Act that it is not the physical contact of the employee to the actual movement in commerce, but his practical and integrated participation in "the proper functioning" of this commerce, that controls determination of coverage. See the *Overstreet* case, *ibid.* The unchallenged findings of fact of the trial court conclusively show that respondent's employees meet this practical test.[7]

Nor are these employees removed from coverage because their employer is not Goldblatt, which is plainly engaged in interstate commerce, but the respondent Agency, which may or may not itself be directly so engaged. As the court below expressly recognized (R. 129–130), the test is the employee's own activities and not the employer's general business. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 524; *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 571–2; *Overstreet* v. *North Shore Corp.,* 318 U. S. 125, 132; *Mabee* v. *White Plains Pub. Co.,* 327 U. S. 178, 184–5; *McLeod* v. *Threkeld,* 319 U. S. 491, 497. "The applicability of the Act is dependent on the character of the employees' work." *Walling* v. *Jacksonville Paper Co., supra,* at 571. Since, as we have

[7] The court below has made it clear (R. 133) that it excluded most of the central office employees solely because, in its view, the great majority of respondent's employees at the warehouses, who were serviced by the central office employees, were not engaged in commerce or in the production of goods for commerce. If, as we urge, the warehouse employees are held covered, even the court below would presumably hold the Act applicable to the others.

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shown, respondent's employees are themselves engaged in commerce by virtue of their connection with Goldblatt's activities in commerce, they are covered regardless of what characterization may be given to respondent's business as a whole. This has been the holding in several comparable cases, including *Walling* v. *Sondock,* 132 F. 2d 77 (C. A. 5), certiorari denied, 318 U. S. 772 (discussed *supra,* pp. 25–26), and *Mitchell* v. *Famous Realty, Inc.,* 211 F. 2d 198 (C. A. 2), certiorari denied, No. 141, this Term, October 14, 1954, involving similar guard and protective agencies.[8] See also *Kirschbaum Co.* v. *Walling,* 316 U. S. 517 (employees of loft building owner whose tenants were engaged in production of goods for commerce); see *infra,* pp. 42–43, for express Congressional recognition and confirmation of this principle.

B. RESPONDENT'S EMPLOYEES ARE ALSO ENGAGED "IN THE PRODUCTION OF GOODS FOR COMMERCE"

A separate and independent ground of coverage is that respondent's employees are "engaged * * * in the production of goods for com-

[8] The same conclusion has been reached by district courts in cases involving employees of independent watchman agencies. *Walling* v. *New Orleans Private Patrol Service,* 57 F. Supp. 143 (E. D. La.); *Walling* v. *Wattam's Patrol Service,* 3 WH Cases 726, 8 Labor Cases Para. 62,023 (W. D. Tenn. 1943); *Haley* v. *Central Watch Service,* 4 WH Cases 158, 8 Labor Cases, Para. 62,002 (N. D. Ill. 1944); *Walling* v. *Lum,* 4 WH Cases 465, 8 Labor Cases Para. 62,185 (S. D. Miss. 1944).

merce". The Seventh Circuit also rejected this contention on grounds which depart radically from the accepted principles applicable to the Act.

1. Respondent concedes, as it must, that "guards and watchmen * * * whose duties are performed at an establishment which produces goods for commerce" are covered by the Act (Br. in Opp., p. 7). The work of such guards, as this Court has repeatedly held, has "a close and immediate tie with the process of production for commerce" and is therefore "an essential part of it." *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 525, 526; *Borden Co.* v. *Borella,* 325 U. S. 679; *Walton* v. *Southern Package Corp.,* 320 U. S. 540; *Armour & Co.* v. *Wantock,* 323 U. S. 126; *Schulte Co.* v. *Gangi,* 328 U. S. 108. The court below refused to follow these decisions on the ground that Goldblatt's warehouses are not used in the production of goods for commerce, because, in handling and otherwise preparing goods for shipment in commerce, Goldblatt's warehouse employees "do nothing to affect the character of the articles themselves" (R. 129). The decision rested on this ground, despite the Seventh Circuit's own previous holding in an action against Goldblatt, that the latter's warehouse employees engaged in "unloading and checking" and otherwise "handling" goods in the course of their interstate movement, or engaged in "servicing"

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the warehouses "where such processed goods were handled", were "all engaged in the production of goods for commerce or in an occupation necessary to such production * * *". *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475, at 476, certiorari denied, 328 U. S. 854.

We submit that the Seventh Circuit's previous ruling in the *Goldblatt* case is correct, and that it follows from the above cited decisions of this Court, that the protective functions performed by respondent's employees are covered by the Act as a "close and immediate" and "essential part" of the production.

The word "produced" is defined in the Act to mean not only "produced, manufactured, mined" but also "handled, or in any other manner worked on" (Section 3 (j) *supra*, p. 3). The breadth of this definition is not only self-evident, but has been confirmed by this Court's decisions in *Western Union* v. *Lenroot*, 323 U. S. 490, and *Borden Co.* v. *Borella*, 325 U. S. 679, *supra*. As was said in those decisions, the definition is not limited to "the manual, physical labor involved in changing the form or utility of a tangible article" (325 U. S. at 683), but "includes every kind of incidental operation preparatory to putting goods into the stream of commerce," "*whether manufacture or not*" (323 U. S. at 503; emphasis added). In the *Borden* case, which dealt with the coverage of maintenance and cus-

todial employees of the Borden Company's administrative office building where "the articles themselves" were in no way physically handled, the Court emphasized that production as defined in Section 3 (j) "is *not* simply the manual, physical labor involved in changing the form or utility of a tangible article" (325 U. S. at 683). [Emphasis added.] Thus, the guards and maintenance employees held by this Court to be within the coverage of the Act in the *Borden* and the other cases cited above are indistinguishable from the employees involved in the instant case. Certainly they were no more closely integrated with the physical "production" activity involved, and in some cases were far less closely integrated.

The reasoning by which the court below reached an opposite conclusion in the instant case, limiting the meaning of "production" to manufacture or fabrication, is thus plainly inconsistent with this Court's decisions. Moreover, decisions of other appellate courts have repeatedly held that warehousing functions of the very type here involved constitute the "production of goods for commerce." *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C. A. 8); *Walling* v. *Friend*, 156 F. 2d 429 (C. A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C. A. 8); see also *Mitchell* v. *Famous Realty, Inc.*, 211 F. 2d 198 (C. A. 2), certiorari denied, No. 141, this Term, October 14, 1954; *Bracey* v. *Luray*, 138 F. 2d 8 (C. A. 4); *Russell Co.* v. *McComb*, 187

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F. 2d 524 (C. A. 5). Indeed, until its decision in the instant case, the Seventh Circuit was itself a leading exponent of the view that the handling of goods in the course of their distribution constitutes "production." *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475, 476, certiorari denied, 328 U. S. 854; *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329, certiorari denied, 332 U. S. 855; *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369, vacated as moot, 326 U. S. 690.

The *Wyandotte, Mutual Wholesale, Blue Star,* and *Montgomery Ward* cases, like the instant case, all involved chain-store organizations engaged in distributing goods manufactured by others. In all of them, just as here, the goods were handled in the course of receiving and shipping them into and out of the warehouses which served the selling outlets. Thus, the warehouse employees in *Wyandotte* were engaged in moving the goods into the warehouse, uncrating them, setting them up, repairing them, putting them in their proper space, taking them out to the platform and other similar handling. All of this work was held to have an "economic significance in relation to [the goods'] being made a part of the stock of the Kansas store and plainly constituted the production of goods for commerce within the definition of section 3 (j) of the Act" (169 F. 2d at 769). Similarly, in *Mutual Wholesale,* where merchandise was repackaged, it was held that such work

was "within that portion of the definition of 'produced' * * * which is expressed as 'handled, or in any other manner worked on in any State'" (141 F. 2d at 340).

The *Friend* case, though involving a livestock dealer and not a chain-store organization, is also directly in point since the employer was not engaged in raising livestock but in selling it, which required such handling activities as sorting and grading. There, the Eighth Circuit said (156 F. 2d at 431): "Thus it appears that Congress intended the term 'production of goods for commerce' to be comprehensive and to include every incidental operation preparatory to putting goods into the stream of commerce," citing *Western Union* v. *Lenroot,* 323 U. S. 490.

As stated above, the Seventh Circuit itself had held such warehousing functions, indeed the very functions here in issue, to constitute "production" within the meaning of this Act. In the second appeal of the action against *Goldblatt,* the court pointed out explicitly:

> * * * this court held * * * employees [in Goldblatt's warehouses] engaged in unloading and checking goods shipped in interstate commerce, and handling them on the platforms, those engaged in shipping such goods from warehouses in Illinois to stores in another State, those engaged in making up goods for sale in the stores in either state, and in the operation, main-

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> tenance and servicing of certain warehouses where such processed goods were handled *were all engaged in the production of goods for commerce or in an occupation necessary to such production* * * * [152 F. 2d at 476].[9] [Emphasis added.]

This ruling was relied upon and reaffirmed by the Seventh Circuit in the *Blue Star* case, *supra*, which also involved warehouses serving a chain of retail stores located in Illinois and Indiana. In sustaining "production" coverage of employees performing virtually identical functions to those here involved, the court said (164 F. 2d at 330–331):

> * * * employees engaged in unloading and checking goods shipped in interstate commerce, and in handling them on the platforms, as well as those engaged in shipping such goods from warehouses in Illinois to stores in another state, *are all engaged in the production of goods for commerce or in an occupation necessary to such production, Walling* v. *Goldblatt Bros.*, 7 Cir., 152 F. 2d 475, 476. [Emphasis added.]

Similarly, in the *Montgomery Ward* case, 150 F. 2d 369, vacated as moot, 326 U. S. 690, the Seventh Circuit broadly construed the term "production" as including the functions performed by

[9] It has been stipulated by the parties in this action that the functions of the various Goldblatt departments and the general duties of the Goldblatt employees have remained the same continuously from 1938 to date (R. 58).

a retail department store and mail order business. The question there was whether the President's seizure powers in the War Labor Disputes Act extended to such a business, and decision turned upon the meaning of the word "production" as used in that Act. Even though the War Labor Disputes Act did not contain the broad definition of the Fair Labor Standards Act, the Seventh Circuit, nevertheless, adopted the Fair Labor Standards Act's definition as construed in *Western Union* v. *Lenroot,* 323 U. S. 490, *supra.*

It is, therefore, difficult to understand how the Seventh Circuit reached the conclusion it did in this case. As it observed, "From a consideration of the processes occurring in the warehouses it is inescapable that there is physical touching by Goldblatt's employees of the goods in the warehouses which are intended for movement in interstate commerce" (R. 128). The "physical touching" or handling occurs in connection with the numerous tasks that must be performed to prepare the goods for shipment from the warehouses to Goldblatt's various stores (including its three Indiana stores), such as removing the goods from stock, placing them in bins, checking them, packing them in containers (Fdgs. 7, 17, 29, 33; R. 102, 106, 110, 112), and in some cases splitting up large packages of goods into smaller ones (R. 129). Plainly, these acts of "handling" are acts of "production" under the holding in the *Western Union* decision that the term includes the pack-

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aging of goods and all other "tasks incidental to preparing for shipment" (323 U. S. at 503). For, as the Seventh Circuit itself has said, "what definition of the word 'production' could otherwise be given when it is used in addition to the word 'manufacture'?" *United States* v. *Montgomery Ward*, 150 F. 2d at 379.

Thus the Seventh Circuit's reliance on the *Western Union* decision as supporting its narrow construction of "production" in the instant case (R. 129) seems baseless. The only exception which the *Western Union* decision made to the inclusion of all "handling" within the scope of "production" was "the handling or working on which accomplishes the interstate transit or movement in commerce itself", such as that carried on by a "common carrier" like telegraph companies and railroads (323 U. S. at 503–504). The context of this exception clearly indicates that it is limited to "handling in carriage or transmission in commerce" when done by a "common carrier * * * in the regular course of its business of [transporting] * * * *goods not produced by such common carrier*" (*id.* at 504). [Emphasis added.] That exception is obviously not applicable here. Goldblatt is not a common carrier; it is a chain-store organization engaged in the handling and distribution of its own goods.

2. As respondent seems to concede (Br. in Opp., pp. 3, 10, 11, 12), the authorities sustaining cover-

age for guards and clerical employees on "production" grounds were not modified by the 1949 Amendments (c. 736, 63 Stat. 910) to the Act. On the contrary, they were explicitly approved. Thus, the Statement of the Majority of the Senate Conferees, after pointing out that amended Section 3 (j)[10] "adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage" (95 Cong. Rec. 14874), states (at p. 14875) that it continues to cover:

> Plant guards, watchmen, and other employees performing protective or custodial services for producer[s] of goods. *Walton* v. *Southern Package Corp.* (320 U. S. 540); *Wantock* v. *Armour & Co.* (323 U. S. 126); *Walling* v. *Sondock,* (132 F. 2d 77 (C. A. 5)); *Engebretson* v. *Albrecht* (150 F. 2d 602 (C. A. 7)); *Slover* v. *Wathen* (140 F. 2d 258 (C. A. 4)); *Shepler* v. *Crucible Steel Co.* (140 F. 2d 371 (C. A. 3)); *Walling* v. *Thompson* (65 F. Supp. 686 (D. C. Calif.)).

[10] Section 3 (j) presently provides, "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof,* in any State." The italicized phrase was substituted by the amendment for the previous language "or in any process or occupation necessary to the production thereof."

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> The work of such employees is, as a rule, closely related and directly essential to production *whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer.* [Emphasis added.]

It will be noted that the Statement of the Senate Conferees specifically approved, in addition to this Court's decisions in *Walton* v. *Southern Package Corp.*, 320 U. S. 540, and *Wantock* v. *Armour & Co.*, 323 U. S. 126, the Fifth Circuit's decision in *Walling* v. *Sondock*, 132 F. 2d 77, certiorari denied, 318 U. S. 772. The latter case, like the instant case, concerned employees of an independent watchman agency. See *supra*, pp. 25–26.

The Statement of the House Managers confirms that of the Senate Conferees. It states that employees engaged in "maintenance, custodial, and clerical work will remain subject to the act, *notwithstanding they are employed by an independent employer* performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce" (95 Cong. Rec. 14929). [Emphasis added.]

The decisions subsequent to the adoption of the 1949 Amendments, involving guards or watch-

men, have uniformly held them within the coverage of the amended Act. *General Electric Co.* v. *Porter,* 208 F. 2d 805, 811 (C. A. 9), certiorari denied, 347 U. S. 951; *Russell Co.* v. *McComb,* 187 F. 2d 574 (C. A. 5); *Union Nat. Bank of Little Rock* v. *Durkin,* 207 F. 2d 848 (C. A. 8); *Messenger* v. *Traders Compress Co.,* 107 F. Supp. 354 (E. D. Okla.), reversed on other grounds, 199 F. 2d 8 (C. A. 10), certiorari denied, 344 U. S. 909; *Mitchell* v. *Famous Realty,* 211 F. 2d 198 (C. A. 2), certiorari denied, No. 141, this Term, October 14, 1954; *Tobin* v. *Promersberger,* 104 F. Supp. 314 (D. Minn.); *Broach* v. *McPherson,* 220 Ark. 457, 248 S. W. 2d 355, reaffirmed, 257 S. W. 2d 565; *Tobin* v. *Hayes,* 11 WH Cases 140, 22 Labor Cases, Para. 67,208 (S. D. Fla.). The same result has been reached with respect to clerical employees under circumstances similar to those present here. *Mitchell* v. *Mercer Water Co.,* 208 F. 2d 900 (C. A. 3), affirming 112 F. Supp. 656 (W. D. Pa.).

C. A SWITCHBOARD OPERATOR REGULARLY ENGAGED IN MAKING INTERSTATE TELEPHONE CALLS IS ENGAGED "IN COMMERCE" WITHIN THE MEANING OF THE ACT

The Act's definition of "commerce" is not limited to "trade" but in plain terms also includes "transportation, transmission, or *communication*" (Section 3 (b) (*supra,* p. 2)). [Emphasis added.] The court below, however, held the Act inapplicable to respondent's switchboard

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operator, whose duties regularly involved the making and receiving of interstate telephone calls to and from respondent's Goldblatt guards (R. 132), on the ground that "communication" must be between employees of different employers in order for it to constitute "commerce." This holding obviously rests on the assumption that the Act applies only to commercial transactions or "trade." The court reasoned that "it takes two to make a trade," and "these two must be the employer and another person or firm with which he is dealing" (R. 132).[11] Not only does this assumption ignore the Act's definition of "commerce," but it is contrary to this Court's decision in *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, as well as to a consistent line of decisions of several courts of appeals. *Bodden* v. *McCormick Shipping Corp.*, 188 F. 2d 773 (C. A. 5); *Fox* v. *Summit King Mines*, 143 F. 2d 926 (C. A. 9); *Darr* v. *Mutual Life Insurance Co.*, 169 F. 2d 262 (C. A. 2), certiorari denied, 335 U. S. 871; *Bell* v. *Porter*, 159 F. 2d 117, 119 (C. A. 7), certiorari denied, 330 U. S. 813.

[11] It may be noted that the court below was also in error in assuming that the interstate communication was limited to communications between respondent's own employees. While this type of communication is described specifically and in detail in the district court's findings, there is also a more general, and unchallenged, finding that "employees in [respondent's] central office also make calls to and receive calls from points in States other than Illinois and Indiana, depending on the circumstances of the business" (Fdg. 39, R. 115).

In the *Powell* case, this Court specifically repudiated virtually the same construction of "transportation" as the Seventh Circuit has now adopted with respect to "communication." It was urged in *Powell* that, since the munitions were produced solely for the Government's use in the national defense and came into the Government's possession before their subsequent interstate shipment, the interstate transportation was not commerce because it was not for any trade or commercial purpose. The Court, however, found "no merit in an interpretation of the Act which would exclude from its coverage those employees who were engaged in the production of munitions for interstate transportation for use or consumption, as distinguished from transportation of them for sale or exchange" (339 U. S. at 512).

The Seventh Circuit itself, even prior to the *Powell* decision, made the same ruling in a similar case, stating flatly that "interstate commerce is not limited to interstate trade." *Bell* v. *Porter, supra,* 159 F. 2d at 119; see also the Seventh Circuit's recent reaffirmation of this ruling in *Mitchell* v. *Pilgrim Holiness Church Corporation,* 210 F. 2d 879, certiorari denied, 347 U. S. 1013.

Other courts of appeals have also rejected the concept that "commerce" must be "trade" to be covered by the Act. In reversing a lower court which denied coverage because the rebuilding and selling of a single surplus yacht was not part of a trade or business, the Fifth Circuit, in *Bodden*

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v. *McCormick Shipping Corp.*, 188 F. 2d 773, citing the *Powell* case, held, "whether or not, therefore, the transportation of goods is 'commerce' within the definition of the Act, does not depend upon whether such transportation is in connection with a trade or business." Prior to the decision in the *Powell* case, the Ninth Circuit also had so ruled in *Fox* v. *Summit King Mines*, 143 F. 2d 926, when it held that gold bullion produced in one State and mailed to a United States mint in another State constituted "production of goods for commerce" under this Act, citing *inter alia International Textbook Co.* v. *Pigg*, 217 U. S. 91; and *Caminetti* v. *United States*, 242 U. S. 470, and concluding that "it is well settled that transmission through the mails is interstate commerce * * * and that it is immaterial whether or not the transportation is commercial in character" (143 F. 2d at 926). In *Darr* v. *Mutual Life Insurance Co.*, 169 F. 2d 262, *supra*, the Second Circuit held that insurance policies were goods produced for commerce even though the transportation occurred between the home office and the branch office.[12]

[12] The only other decision precisely on this point is a district court decision which also reached the opposite result from that of the Seventh Circuit in the instant case. In *Walling* v. *Paramount-Richards Theatres*, 61 F. Supp. 290 (E. D. La.), the court held that telephone operators who received and transmitted long distance calls to and from out-of-state theaters owned by their employer were engaged in commerce.

The narrow ruling on interstate communication in the instant case is also inconsistent with this Court's decisions in *North American Co.* v. *S. E. C.*, 327 U. S. 686 (where it was held that a holding company's use of the "mails and facilities of interstate commerce" in order to "maintain its other relationships and contacts with its own subsidiaries" constituted commerce (327 U. S. at 694–695)); and *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128, in which the Court ruled that "interstate communication of a business nature, whatever the means of such communication, is interstate commerce * * * ."

CONCLUSION

The decision of the court of appeals should be reversed, insofar as it reversed the judgment of the district court, and the judgment of the district court should be reinstated.

Respectfully submitted.

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